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Conscience in Commerce: Conceptualizing Discrimination in Public Accommodations

AMY J. SEPINWALL

According to much current law and theory, a public accommodation that offers a good or service to one customer cannot refuse to provide that same good or service to another patron simply because of the latter's identity. Thus, in many jurisdictions, reception hall owners must rent their spaces to both a Black Baptist Church and the Christian Identity KKK, wedding vendors must sell their goods to a marrying couple no matter the sex of the couple's members, and foster parent agencies must serve same- and opposite-sex parenting duos alike. Call the principle underpinning this policy the "Equal Access" principle: The principle holds that a vendor can choose the products he sells but not the customers he serves; equally, a public service agency can choose its portfolio but not its patrons. The principle lies at the core of recent cases in which religion and sexual orientation, or religion and gender identity, have clashed in public accommodations, and it is pervasive among commentators who seek to ensure that the retail sphere—whether commercial or charitable—remains a discrimination-free zone.

This Article champions the egalitarian spirit of Equal Access, but it argues that the principle itself is unworkable, unreliable, and perhaps even incoherent. Equal Access permits impermissible discrimination and forbids refusals of service that in fact promote equality's ends. Further, Equal Access derives support from a problematic conception of the retail sphere—one that sees commerce as amoral and so cannot even make sense of a vendor's interest in exercising their conscience at work.

In place of this morally neutered conception, this Article aims to vindicate a picture of the marketplace as richly moral. And in place of Equal Access, this Article aims to offer a more principled and nuanced account of when and why retail discrimination is impermissible. That account would forbid identity-based discrimination but permit refusals of service for projects that foster hate toward protected groups, even where the hate-based project is intimately linked to a protected characteristic (as with religious groups that mandate white supremacy). Far from perpetuating discrimination, these refusals instead promote anti-discrimination norms, and they help realize the vision of the morally inflected marketplace that this Article defends.

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Conscience in Commerce: Conceptualizing Discrimination in Public Accommodations

AMY J. SEPINWALL *

INTRODUCTION

No one should be denied service at a place of public accommodation because of who they are. Patrons should not be kicked out of Starbucks because they are Black,¹ couples should not be denied landscape gardening services because they are gay,² transgender people should not be removed from restaurants for using the restroom corresponding to their gender identity,³ and a parent should not be denied the opportunity to foster a child because they happen to be married to someone of the same sex.⁴

The prevailing approach to preventing discrimination of this kind imposes a categorical ban on refusing service to anyone. As Justice Elena Kagan has stated, “[a] vendor can choose the products he sells, but not the

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¹ Anna Orso, *One Year Later: A Timeline of Controversy and Progress Since the Starbucks Arrests Seen ‘round the World*, PHILA. INQUIRER (Apr. 12, 2019), <https://www.inquirer.com/news/starbucks-incident-philadelphia-racial-bias-one-year-anniversary-stutter-dilworth-park-homeless-tables-20190412.html>.

² *Gay Couple in Georgia Denied Service by Landscaper: “I Always Turn Them Down”*, GA. UNITES AGAINST DISCRIMINATION, <https://georgiaunites.org/gay-couple-in-georgia-denied-service-by-landscaper-i-always-turn-them-down/> (last visited Nov. 8, 2020); Rhuaridh Marr, *Atlanta Landscaper Refused to Work for Gay Couple Due to Their “Perverse” Marriage*, METRO WKLY. (Aug. 13, 2018), <https://www.metroweekly.com/2018/08/atlanta-landscaper-refused-to-work-for-gay-couple-due-to-their-perverse-marriage/>.

³ Justin Wm. Moyer, *D.C. Restaurant Fined \$7,000 After Asking Transgender Woman for ID Before Letting Her Use Bathroom*, WASH. POST (Jan. 17, 2019, 5:12 PM), https://www.washingtonpost.com/local/dc-news/dc-restaurant-fined-7000-after-asking-transgender-woman-for-id-before-letting-her-use-bathroom/2019/01/17/00d1fc6e-1a86-11e9-afe1-7bd2532c9988_story.html. Cf. Branson LB, *I Got Kicked Out of a YMCA Locker Room—Twice—Because I’m Trans*, BUZZFEED NEWS (Aug. 30, 2018, 11:11 AM), <https://www.buzzfeednews.com/article/bransonlb/i-got-kicked-out-of-a-ymca-locker-room-twice-because-im>. (detailing the author’s exclusion from a YMCA locker room without consequences).

⁴ This is the question at the heart of a case pending before the Supreme Court, *Fulton v. City of Philadelphia*, No. 19-123, which I discuss below. See *infra* text accompanying notes 117–19, as well as Section III.B.

customers he serves—no matter the reason.”⁵ Commentators adopt the same absolutist policy, maintaining, for example, that one who “puts out a sign” or holds himself out to the public as a place of public accommodation open for customers is bound to accept everyone.⁶ The policy has been decisive in ruling against wedding vendors in all but one of the cases where the vendors have sought exemptions from anti-discrimination laws in their bids to deny service to same-sex couples.⁷ And it stands to play a role in the Supreme Court’s pending decision in *Fulton v. City of Philadelphia*, in which Catholic Social Services seeks an exemption from Philadelphia’s law prohibiting discrimination in public accommodations.⁸

While a categorical approach has worthy egalitarian aims, it threatens to rule out conscientious refusals of service that should evoke our sympathy, and perhaps even our support. Consider the restaurateur who announced, in the wake of the Orlando nightclub shootings, that owners of assault rifles were not welcome at her establishments;⁹ or the owner of the Red Hen restaurant, who ejected Sarah Huckabee Sanders, former press secretary for President Trump, because Sanders had defended the President’s policy of

⁵ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1733 n.* (2018) (Kagan, J., concurring). See also *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. App. 2015) (explaining that a store may not “refuse services to Craig and Mullins that it otherwise offers to the general public”).

⁶ Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1410 (1996) [hereinafter *Singer, No Right*]. See also Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 88 (2015) (“[A]n enterprise that offers to serve the public becomes part of the social realm of commerce. Such an enterprise properly can be regarded as a place of public accommodation with a duty to serve everyone.”). Other prominent scholars have approvingly cited Singer’s “holding out” conception. *Singer, No Right*, *supra* at 1410. See, e.g., Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25, 52–58 (2015); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1225 (2014); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 213 n. 53 (2018); Elizabeth Sepper, *Religious Exemptions, Harm to Others, and the Indeterminacy of a Common Law Baseline*, 106 KY. L.J. 661, 666–67 (2018). See also *infra* note 173 and accompanying text (collecting other sources and tracing the history of the position).

⁷ See, e.g., Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 132, 133 n.2 (2018) (collecting cases on denial of service to same-sex couples). Wedding vendors have prevailed in only one case thus far, involving a business that produces custom-made wedding invitations. See, e.g., Daniel Avery, *Outrage After Court Says Wedding Invitation Makers Can Refuse Gay Couples: ‘A License to Discriminate’*, NEWSWEEK (Sept. 17, 2019, 9:49 AM), <https://www.newsweek.com/arizona-wedding-invitation-gagy-supreme-court-1459627>. For an overview of public accommodations statutes, see *infra* notes 39 & 74.

⁸ See Brief for City Respondents at 2, *Fulton v. City of Philadelphia*, No. 19-123 (Aug. 13, 2020) (“[CSS] has insisted that the Constitution entitles it to . . . perform government services . . . while disregarding a contractual obligation that every other foster family care agency must follow.”).

⁹ See, e.g., Katharine Q. Seelye, *Restaurant Owner Spurns Those Who Are O.K. With AR-15s*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/us/think-ar-15s-are-ok-this-restaurant-owner-doesnt-want-your-business.html>. For a similar effort, consider In SEO, an internet company whose owner announced that the company would no longer do business with any Trump supporters. See Eugene Volokh, Opinion, *Can Businesses Refuse to Serve—or Employ—Trump Supporters?*, WASH. POST (Nov. 25, 2016, 8:23 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/25/can-businesses-refuse-to-serve-or-employ-trump-supporters/>.

separating immigrant children from their parents;¹⁰ or the high-powered corporations that refused to do business in North Carolina after it passed its infamous “bathroom bill.”¹¹ Egalitarians should condemn the baker who refuses to provide a cake for a same-sex wedding.¹² But what about a different baker who refuses to provide a cake for a religiously-mandated marriage between a middle-aged man and a non-consenting teenage girl?¹³ And while we should insist on people’s right to wear “Black Lives Matter” shirts,¹⁴ what about similar pressure to protect the rights of those who want to wear white supremacist paraphernalia?¹⁵

There are distinctions to be made in the foregoing cases—ones that would prohibit identity-based discrimination while also protecting businesses’ rights to deny their products to individuals or groups promoting oppression or hate.¹⁶ The problem that this Article seeks to address is that the two main approaches in law and theory to preventing discrimination cannot yield these distinctions. Instead, these approaches issue a blanket prohibition on turning patrons away, thereby requiring, for example, that one serve the Black rights advocate and Christian Identity KKK member alike.¹⁷

¹⁰ Avi Selk & Sarah Murray, *The Owner of the Red Hen Explains Why She Asked Sarah Huckabee Sanders to Leave*, WASH. POST (June 25, 2018, 5:24 PM), <https://www.washingtonpost.com/news/local/wp/2018/06/23/why-a-small-town-restaurant-owner-asked-sarah-huckabee-sanders-to-leave-and-would-do-it-again/>.

¹¹ Emery P. Dalesio & Jonathan Drew, *AP Exclusive: ‘Bathroom Bill’ to Cost North Carolina \$3.76B*, AP NEWS (Mar. 30, 2017), [https://apnews.com/e6c7a15d2e16452c8dbc2756fd67b44/AP-Exclusive:-‘Bathroom-bill’-to-cost-North-Carolina-\\$3.76B](https://apnews.com/e6c7a15d2e16452c8dbc2756fd67b44/AP-Exclusive:-‘Bathroom-bill’-to-cost-North-Carolina-$3.76B).

¹² *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1720 (2018); *Klein v. Or. Bureau Lab. & Indus.*, 139 S. Ct. 2713, 2713 (2019); *Cf. State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1209 (Wash. 2019) (answering the Supreme Court’s question posed by *Klein*—whether the Washington Courts violated the Constitution’s guaranty of religious neutrality—in the negative); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (citing to the Supreme Court’s decisions declining to adopt a distinction between status and conduct for refusing to serve same-sex couples).

¹³ One might think such things happen only in dystopian fiction. *See, e.g.*, MARGARET ATWOOD, *THE TESTAMENTS* 387 (2019) (portraying religiously motivated marriages between a middle-aged man and a non-consenting teenage girl). But in fact these marriages are legal in all but three states. *See, e.g.*, Julie Zauzmer, *Some Religious Groups Allow Courtship of Underage Girls*, DURANGO HERALD (Nov. 18, 2017, 6:18 AM), <https://durangoherald.com/articles/195498> (discussing the prevalence of the legality of such marriages). I elaborate on the laws around underage marriage in what follows. *See infra* notes 154–57 & 182–84.

¹⁴ In 2016, Savannah police were called to eject four Black individuals quietly sitting through services at the Bible Baptist Church wearing Black Lives Matters (BLM) T-shirts, in silent protest of the church’s decision to fire a daycare worker for wearing a BLM shirt to work. Beatrice DuPuy, *Black Lives Matter Member Plans to Sue Georgia Church for Discrimination After It Banned Group*, NEWSWEEK (Nov. 16, 2017, 6:42 PM), <https://www.newsweek.com/black-lives-matter-members-kicked-out-church-713892>.

¹⁵ *Restaurant Violated Rights of Swastika Wearers, Judge Rules*, AP NEWS (Mar. 11, 1988), <https://apnews.com/72b0d6ccf7eed17f12b015df835fc60e>.

¹⁶ I identify this as the key distinction and advance an account of permissible refusals of service on this basis, in Part III, *infra*.

¹⁷ *See, e.g., Fighting for White Rights for Over 140 Years*, WHITE CAMELIA KNIGHTS OF THE KU KLUX KLAN, <http://www.wckkkk.org/identity.html> (last visited July 29, 2020) (describing what it means to be a “Christian Identity Klan” and drawing upon biblical support for the KKK’s (purported) white supremacy). *Cf. Fox v. Washington*, 949 F.3d 270 (6th Cir. 2020) (reversing and remanding a district court decision holding that a prison that refused to provide Christian Identity inmates with a space free of “non-white” inmates for their worship did not violate Religious Land Use and Institutionalized Person Act).

Or, as Douglas Laycock approvingly writes, “The same public accommodations law that prohibits discrimination on the basis of sexual orientation also prohibits discrimination on the basis of religion . . . [even if the] religious belief and practice is extreme and offensive.”¹⁸

The first of these blanket approaches denies that a business owner has any reason to care about the identity of their customers or the projects to which they will put the business’s goods. The approach might be captured in the adage *pecunia non olet* (“money does not smell/taint”).¹⁹ On this view, market transactions are inherently amoral, so vendors cannot be complicit in the uses to which customers put their goods or services.²⁰ As such, it can never be immoral to provide service; it can only be immoral to deny it.

To see that conceiving of the market as amoral is potentially perverse, return to the example of the non-consensual, but religiously dictated, underage marriage. If you bake a wedding cake in your home that you gift to the couple, then you have troublingly endorsed the marriage. Earn money from selling a cake for that same marriage at your bakery and you have not; after all, the thinking goes, it is just business.

The second approach is ecumenical about the role of conscience in the market but strictly egalitarian as regards individual customers. On this approach, a store may not sell a particular good to one person and then refuse to sell that same good to a different person.²¹ Or again a public service agency may not offer a particular service (e.g., foster placement) to one set of clients but not another, at least where the only difference between the two

¹⁸ Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL’Y 49, 55 (2018).

¹⁹ See, e.g., Tim Worstall, *Pecunia Non Olet*, FORBES (July 27, 2011, 9:48 AM), <https://www.forbes.com/sites/timworstall/2011/07/27/pecunia-non-olet/#e7edcc412737> (using the phrase *pecunia non olet* to question the rejection of money from a questionable source); Ruben George Oliven, *The Money Rhetoric in the United States*, in ECONOMIC PERSUASIONS 167 (Steven Gudeman, ed., 2009) (discussing the American proverb “[m]oney doesn’t smell”); Carly Silver, ‘*Pecunia Non Olet*’: How a Roman Emperor Revived the Government with a Urine Tax, ALL THAT’S INTERESTING (July 2, 2019), <https://allthatsinteresting.com/pecunia-nonolet>.

²⁰ This conception of business was decisive in the lower courts in the Affordable Care Act contraceptive mandate challenges. See, e.g., *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Hum. Servs.*, 724 F.3d 377, 385 (3d Cir. 2013), *rev’d and remanded sub nom*; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (concluding that secular corporations do not have the same right to free exercise of religion that churches do). It is also a fixture in commentary seeking to protect individual rights to service in the retail sphere. See, e.g., *supra* note 6; *infra* Section I.B.

²¹ This was just Justice Kagan’s thought in *Masterpiece*. See *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1733–34 (2018) (Kagan, J., concurring) (criticizing the baker’s decision to not serve a cake that they would have served another couple). Or, as Justice Gorsuch put the operating principle, “the fact that [the baker] would make [a particular wedding cake] for some means he must make [that cake] for all.” *Id.* at 1737–38 (Gorsuch, J., dissenting). It is worth noting that it was on this very ground that Colorado had ruled against the baker in *Masterpiece*, ordering him to provide “same-sex couples . . . any product [he] would sell to heterosexual couples.” *Id.* at 1726 (internal citations omitted). See also *id.* at 1750 (Ginsburg, J., dissenting) (“The fact that [the baker] might sell other cakes and cookies to gay and lesbian customers was irrelevant. . . . What matters is that [he] would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.”). For theorists who support Equal Access, see *supra* note 6 and *infra* notes 70–72.

tracks an identity-based characteristic.²² Call this approach “Equal Access.” Proponents of Equal Access imagine that it can be adequately protective of conscience since it allows store owners to determine the goods they sell. As such, the law cannot, for example, compel a baker to produce a cake with a biblical message decrying homosexuality for a religious patron if the baker would not produce any cake with a message decrying homosexuality for a secular patron.²³ But this approach is not nearly as discerning as one might hope. For it would also compel the baker to sell his wares for a KKK banquet, just as it would have required PayPal to continue transacting with North Carolina businesses notwithstanding PayPal’s opposition to that state’s “bathroom bill,”²⁴ since PayPal was presumably not boycotting states with more liberal bathroom policies. So too Equal Access would forbid foster agencies from excluding families who oppose homosexuality on religious grounds, no matter the sexual orientation of the foster child.²⁵

Worse still, Equal Access may in fact permit instances of discrimination that should be impermissible—in particular, those where the excluded party has no relevant counterpart. For example, if a restaurant requires every patron to use the bathroom corresponding to the sex they were assigned at birth, to whom can transgender patrons point to establish their unequal treatment? This problem becomes acute in the case of custom-made products. If a vendor’s products are highly unique, then the vendor never makes the same product twice. As such, he can completely evade Equal Access. No wonder the key businesses seeking to deny service to same-sex couples offer highly customizable wares—floral arrangements,²⁶ photography services,²⁷ wedding invitations,²⁸ and wedding cakes.²⁹ And in the highly fact-sensitive context of foster family certification,³⁰ a similar

²² This is just how the Respondents in *Fulton v. City of Philadelphia* characterize the nature of the discrimination that CSS would enact. See Transcript of Oral Argument at 78, *Fulton v. City of Philadelphia*, No. 19–123 (Nov. 4, 2020) (Neal Katyal arguing) (“Basically, CSS has said they will not permit LGBT couples to be part of their screening process. So, if you’re a married gay couple, . . . the doors are closed to you, but not to a -- not to a heterosexual couple.”).

²³ William Jack, a fundamentalist Christian customer who was turned away by a baker, sought a cake with a message communicating animus toward gays and lesbians. See *Masterpiece Cakeshop*, 138 S. Ct. at 1719, 1732. The cake in the *Masterpiece* case, by contrast, did not convey a message whose aim was to denigrate religion. The couple wanted a cake celebrating their marriage. *Id.* at 1724. I elaborate on the distinction between the two cake commissions below. See *infra* Section II.A.

²⁴ “Bathroom Bill” to Cost North Carolina \$3.76 Billion, CNBC (Mar. 27, 2017, 7:00 AM), <https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>.

²⁵ See *infra* note 200 and accompanying text.

²⁶ *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

²⁷ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013).

²⁸ *Brush & Nib Studio, LC v. City of Phoenix*, 448 F.3d 890 (Ariz. 2019).

²⁹ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018); *Klein v. Or. Bureau Lab. & Indus.*, 410 P.3d 1051 (Or. App. 2017), *cert. granted, judgment vacated*. But cf. *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 429 (N.Y. App. Div. 2016) (denying wedding venue owner’s religious freedom challenge to New York’s public accommodations law).

³⁰ See *infra* Section III.B.

problem arises: no two families are alike so again the discriminating agency can never be accused of failing to treat likes alike.

Commentators have contributed to a burgeoning, although still relatively new,³¹ literature about whether religious freedom or freedom of expression confers a right upon a business to be exempt from anti-discrimination norms.³² This Article critiques the conceptualization of the norms themselves. I argue that the categorical approach, enshrined in Equal Access, relies on an unappealing vision of the retail sphere, and it yields results that frustrate egalitarian aims. Insofar as Equal Access is the bedrock of public accommodations laws, those laws stand in need of a new foundation, which is just what this Article aims to provide.

In Part I, I lay bare the conceptual underpinnings of Equal Access—namely, a view of commerce as amoral and complicity-free. This is the first strategy for ensuring access for all: if it is all just business, then vendors have no reason to care about who buys their wares and for what ends. Further, one sees this commitment to amorality not only in the profane realm of the market but even in the eleemosynary space of public services, where a consumerist orientation has taken hold, as I shall argue. In response to this view, I contend that we need not eschew morality in the marketplace in order to block exemptions from anti-discrimination laws.

In Part II, I turn to the second strategy for ensuring Equal Access—enforcement of the principle itself. I aim to show that Equal Access not only compels vendors to contribute to projects they have reason to oppose, it also exposes customers with protected characteristics to the very discrimination that it is supposed to prevent.

Part III offers an alternative to Equal Access. There, I advance a policy for public accommodations that can secure equality while also accommodating some vendor claims of conscience. In particular, I focus on cases where a would-be customer seeks the vendor's goods or services for a project involving hate or oppression. I argue that the vendor need not lend herself or her work to such projects, and I suggest that one might, on this ground, distinguish between a religious business owner's refusal to provide, say, wedding cakes to LGBTQ patrons (impermissible, on the account

³¹ See Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 85 n.22 (2019) (noting “state public accommodations law has received far less attention from legal scholars until recently”).

³² See, e.g., NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 115, 138 (2017). For more on conscientious refusals to serve same-sex couples, see Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125 (2016); Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (2018); Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between “Participation” and “Endorsement” in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593 (2017); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016).

advanced here) and the secular business owner's refusal to provide a religious customer with a cake (even a generic cake) that they will serve at an event decrying homosexuality (permissible).

Part IV aims to buttress the positive account against a possible objection: because the account would have the state permit discrimination against particular viewpoints, one might worry about state action. For example, if the state compels a printer to produce leaflets for a NAACP event but not for a Christian KKK event, is the state impermissibly discriminating on the basis of race or impermissibly promoting some viewpoints while thwarting others? Part IV is devoted to establishing that there is no state action here. The final part concludes.

I. MORALITY IN THE MARKET

"Complicit" was named the word of the year for 2017,³³ which fittingly ended with oral argument in *Masterpiece Cakeshop v. Colorado*.³⁴ In that case, the Court confronted the question of whether retail owners enjoy a so-called right to discriminate on conscientious grounds.³⁵ While the Court declined to answer that question, it nonetheless hinted at a resolution.³⁶ The Court acknowledged "religious and philosophical objections to gay marriage" but contended that in general, "such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."³⁷ The Court has

³³ Amy B. Wang, 'Complicit' is the 2017 Word of the Year, According to Dictionary.com, WASH. POST (Nov. 27, 2017, 5:53 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/11/27/complicit-is-the-2017-word-of-the-year-according-to-dictionary-com/>.

³⁴ Transcript of Oral Argument, *Masterpiece*, 138 S. Ct. 1719 (2017) (No. 16-111) (indicating that oral argument was heard in December 2017).

³⁵ Christopher W. Schmidt, *Yes, There Is a Right to Discriminate*, WASH. POST (Dec. 5, 2017, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/yes-there-is-a-right-to-discriminate/>; Erwin Chemerinsky, *Chemerinsky: Is There a Constitutional Right for a Business to Not Serve Customers?*, ABA J. (Nov. 30, 2017, 8:30 AM), http://www.abajournal.com/news/article/is_there_a_constitutional_right_for_a_business_to_not_serve_customers.

³⁶ *Masterpiece*, 138 S. Ct. at 1727. While the Court seemed to lean against a policy that would grant exemptions from public accommodations laws, *id.*, it nonetheless found in favor of the store owner on the narrow ground that he had not received a fair hearing in the courts below. The Court clearly remains loath to weigh in on these issues, remanding two subsequent wedding vendor cases to ensure they were not infected by the religious bias the Court had found in *Masterpiece*. See *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (remanding the case to the Supreme Court of Washington); *Klein v. Or. Bureau Lab. & Indus.*, 139 S. Ct. 2713 (2019) (remanding case to the Court of Appeals of Oregon).

³⁷ *Masterpiece*, 138 S. Ct. at 1727. The Court allowed that there might be a narrow range of cases in which the law could not compel a vendor's service—viz., those in which the good or service sought involved speech. See *id.* at 1723 ("If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all."). I argue elsewhere that the distinction between expressive and non-expressive goods and services is misbegotten. Amy J. Sepinwall, *Free Speech and Off-Label Rights*, 54 GA. L. REV. 463, 473 (2020).

prohibited race-based denials of service on precisely this ground,³⁸ and all state public accommodations laws, as well as Title II of the Civil Rights Act, do so as well.³⁹

The Court's skepticism about conscientious exemptions from public accommodations laws finds an echo in scholarship. Commentators keen to prohibit discrimination argue that it matters little whether the store owner bears the kind of connection that would, outside of the marketplace, render him complicit in his customers' projects, for the marketplace is a conscience-free zone.⁴⁰ One engages in market transactions with one and only one principle: self-interest, narrowly construed.⁴¹ Beyond a very basic set of moral rules aimed at ensuring property rights and fair play, morality has no place.⁴² The market is instead "[t]he archetype of the profane."⁴³ Relying on this conception, Colorado argued in *Masterpiece* that freedom of expressive association, which does permit some discrimination in non-profit

³⁸ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 408 (1968). *Cf. Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967) (holding that a state constitutional amendment authorizing discrimination in housing on any basis is not merely private action; instead, it involves the state in such a way as to make the amendment a violation of the Fourteenth Amendment).

³⁹ In general, Title II of the Civil Rights Act prohibits discrimination on the basis of race, sex, religion, or national origin in restaurants, hotels, gas stations, and places of entertainment. 42 U.S.C. § 2000a. But Title II does not protect against LGBTQ discrimination. *Id. Cf. Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 287 (2010) ("Same-sex couples have no federal constitutional right to be free from discrimination, based on sexual orientation, in the non-governmental provision of goods and services.") (footnote omitted). Nor does Title II apply to retail establishments like bakeries, flower shops, and clothing stores. 42 U.S.C. § 2000a; Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 936 (2015) [hereinafter Singer, *Sodom*]. By contrast, about half of the states include discrimination on the basis of sexual orientation in their public accommodations laws. *Id.* at 943. Further, many states have adopted more capacious understandings of what constitutes a public accommodation, applying their anti-discrimination provisions not only to businesses plausibly connected to interstate travel and commerce (paradigmatically, hotels and restaurants) but to all retail establishments. For critical overviews of public accommodations laws, see generally Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017). For information regarding LGBTQ protections in particular, see Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 639 n.25 (2016). For an authoritative history of protections against sex-based discrimination in public accommodations, see Sepper & Dinner, *supra* note 31.

⁴⁰ See *infra* Section I.B.

⁴¹ See *infra* note 65. *Cf. C. Edwin Baker, The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 985 (2009) ("[A] firm has no freedom except to adopt ever more profitable techniques.").

⁴² See, e.g., Shirley Woodward, *Debt to Society: A Communitarian Approach to Criminal Antiprofit Laws*, 85 GEO. L.J. 455, 486 (1996) ("The market is an amoral venue that provides rewards and incentives independently of the moral worth of the activity involved."). For a description of the market that draws out these features, see Eric W. Orts & Amy J. Sepinwall, *Collective Goods and the Court: A Theory of Constitutional Commodification*, 97 WASH. U. L. REV. 637 (2020).

⁴³ Marjorie M. Shultz, *Questioning Commodification*, 85 CALIF. L. REV. 1841, 1855 (1997) (reviewing MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996)).

organizations,⁴⁴ is of no avail for “clearly commercial entities.”⁴⁵ Moreover, the notion of an amoral marketplace informs not just the retail sphere but also an adjacent one—namely, the sphere of public services, especially when carried out by private entities.⁴⁶

This Part aims to show that commerce does not have the neutralizing effects that courts and commentators impute to it. To that end, I address in turn two ways commentators understand the market’s morality-washing. Some commentators deny that providing goods or services to a customer renders the vendor complicit in the project where the good or service will be used.⁴⁷ Others argue that the marketplace is not an arena where conscience may take hold.⁴⁸ So the vendor is not complicit either because he is not connected to the customer’s project in the right way or because market transactions immunize him from what would otherwise be an implicating connection. Both of these strategies are wrongheaded. The first misconceives complicity and the second misconceives the market. I address each of them in turn.

A. *Complicity in the Commercial Sphere*

Conscience-based complicity claims are claims to be released from a law that one opposes on religious or moral grounds.⁴⁹ But why should government confer “a private right to ignore [a] generally applicable

⁴⁴ See, e.g., *Boy Scouts of Am. V. Dale*, 530 U.S. 640, 648–49 (2000) (applying this principle to the Boy Scouts of America); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 563 (1995) (applying this principle to the South Boston Allied War Veterans Council). See Singer, *Sodom*, *supra* note 39, at 939 (“Freedom of association is a bedrock constitutional principle but it is not a basis for claiming a right to establish market structures that are premised on invidious discrimination.”).

⁴⁵ Brief for Respondent Colo. C.R. Comm’n at 31, *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111) (internal quotation marks omitted) (quoting *Dale*, 530 U.S. at 657). See also Brief for Respondents Charlie Craig and David Mullins at 14–15, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111) (detailing the Court’s historic refusal to allow *retail* entities to discriminate, no matter the source of the discriminatory motive (religion, freedom of association, etc.)). Cf. Kendrick & Schwartzman, *supra* note 7, at 134 (implying that the “questions about the scope of civil rights laws and the limits of First Amendment rights” that the wedding vendor cases raise have a special valence when the protesting parties are “for-profit businesses”).

⁴⁶ See Clare Kindall, *Symposium: The First Amendment Does Not Require Governments to Contract with Parties Who Do Not Comply with Neutral, Generally Applicable Rules*, SCOTUSBLOG (Oct. 29, 2020, 12:50 PM), <https://www.scotusblog.com/2020/10/symposium-the-first-amendment-does-not-require-governments-to-contract-with-parties-who-do-not-comply-with-neutral-generally-applicable-rules/> (arguing that, in *Fulton*, “[t]he state is not regulating; it is participating in the market for a particular service.”)

⁴⁷ See *infra* Section I.A.

⁴⁸ See *infra* Section I.B.

⁴⁹ Melissa Murray has recently argued that there is more than a bid to protect conscience at work in the wedding vendors’ complicity claims. She sees in them as well a bid “to reassert and enforce traditional sexual mores that the state no longer enforces.” Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 832 (2018). I believe that she accurately diagnoses the motives of particular wedding vendors. But I also allow that at least some wedding vendors genuinely care only about protecting their own souls, with no further political ends. My analysis contemplates only them.

law[]”?”⁵⁰ Why defer to conscience at all? And if we are going to defer in some cases, which criteria should we use to identify the appropriate ones?

Exemption opponents tend to operate with an objective conception of complicity, according to which complicity assessments are the prerogative of those who judge, not those who would bear the worrying connection.⁵¹ What matters then is whether the community would view a person as implicated in someone else’s wrong, not whether the person would so view themselves. As Michael Dorf puts it: “The Constitution does not protect people from *feeling complicit* in what they regard as evil.”⁵²

It is easy to see why, on an objective conception, one would deny that store owners are complicit in their customers’ projects. When we judge others, we rightfully require some kind of culpable connection to a wrong in order to find them complicit in that wrong.⁵³ In particular, we typically require that they participate in the wrong, or help choose it, or belong to the group on whose behalf it was performed.⁵⁴

But the store owner who worries about his complicity in his customer’s projects bears none of these connections to those projects. For example, a vendor who bakes a cake for a wedding does not participate in the marriage, have a role in the couple’s decision to marry, or even belong to a group that can be said to be represented in the couple’s union. John Corvino puts the point pithily when he writes, “people recognize that baking a wedding cake

⁵⁰ *Emp. Div. v. Smith*, 494 U.S. 872, 885–86 (1990). Or, in the more florid words of Brian Leiter, allowing for exemption on conscientious grounds “would appear to amount to a legalization of anarchy!”—especially if, as Leiter believes, secular claims of conscience warrant no less respect than religious ones. BRIAN LEITER, *WHY TOLERATE RELIGION?* 91 (2012).

⁵¹ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting) (arguing that, in assessing complicity claims, the Court must “distinguish[] between ‘factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,’ which a court must accept as true, and the ‘legal conclusion that . . . [plaintiffs’] religious exercise is substantially burdened,’ an inquiry the court must undertake”) (citation omitted); *Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) (“[F]or the adjudication of a [Free Exercise] constitutional claim, the Constitution, rather than an individual’s religion, must supply the frame of reference.”).

⁵² Michael C. Dorf, *The Troublingly Widening Gyre of Complicity Claims*, VERDICT (Nov. 1, 2017), <https://verdict.justia.com/2017/11/01/troublingly-widening-gyre-complicity-claims>. An objective conception of complicity also animates the First Amendment Scholars’ amicus brief in *Fulton v. Philadelphia*, when they suggest that it is “outlandish” for Catholic Social Services to worry that Philadelphia would be compelling it to speak and act according to Philadelphia’s beliefs were it to abide by Philadelphia’s non-discrimination law. See Brief of First Amendment Scholars As Amici Curiae in Support of Respondents at 26, *Fulton v. City of Philadelphia*, No. 19–123 (Aug. 20, 2020).

⁵³ See generally Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521 (2017) (describing the conventional conception of complicity and tracing its origins).

⁵⁴ It was on just this basis that most lower courts denied that the contraceptive mandate made employers complicit in their employees’ contraceptive use. See, e.g., *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting) (“[A]n employer, by virtue of paying . . . for an employee’s health care, does not become a party to the employee’s health care decisions.”). Cf. *Autocam Corp. v. Sebelius*, NO. 1:12–CV–1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) (“The mandate does not compel the [owners] as individuals to do anything. They do not have to use or buy contraceptives for themselves or anyone else.”).

is not tantamount to participating in a marriage: If it were, there would be a lot of polygamous bakers in the world.”⁵⁵

There is nothing inherently problematic about an objective conception of complicity. Indeed, that conception should govern when the *state*, or even the moral community, is judging an individual’s guilt. Life would be oppressive if we could be judged complicit for even the most tenuous connections to others’ wrongs.⁵⁶ The problem here is that the objective conception makes no sense when applied to conscience-based complicity claims, for these are fundamentally about an individual judging *her own* guilt. It is no answer to say to the conscientious objector to a military draft, “well, the state does not believe war is morally wrong,” or “don’t worry about your conscience; you will just be cleaning the guns/cooking the meals, etc.” A person cannot replace her own sense of right and wrong—or her own sense of when she is sufficiently close to a wrong to be implicated in it—with someone else’s. If it were reasonable to demand that she did, the state would never offer conscientious exemptions. Why, then, does the state do so?

The answer, as I argue at greater length elsewhere, is that the state has an obligation to protect individuals from the *experience* of acting against conscience.⁵⁷ Acting against conscience can be deeply painful; more than that, it can be deeply violative of one’s integrity or self-conception.⁵⁸ Being compelled by law to do something one believes is wrong can also disable one from actively condemning the wrong when others commit it; that is, it can undermine one’s standing and authority to oppose the wrong, which is a loss to the moral community as a whole.⁵⁹

Since, in offering conscience-based exemptions from laws or policies, we aim to respond to how the conscientious objector would *feel* were they required to participate in another’s (putative) wrong, we cannot proceed objectively. It makes no sense for us to substitute our sense of right and wrong for theirs; nor does it make sense to super-impose our sense of the kind or degree of connection necessary to “in fact” make one complicit.⁶⁰

⁵⁵ John Corvino, “*Bake Me a Cake*”: *Three Paths for Balancing Liberty and Equality*, WHAT’S WRONG? (Oct. 15, 2015), <https://whatswrongcvsp.com/2015/10/15/guest-post-from-john-corvino-bake-me-a-cake-three-paths-for-balancing-liberty-and-equality/>.

⁵⁶ Compare Herlinde Pauer-Studer, *Complicity and Conditions of Agency*, 35 J. APPLIED PHIL. 643, 643–44 (2018) (illustrating the tension in defining a more expansive understanding of complicity that goes beyond intentionality and causality, but indicating that complicity should still require the agent to be involved in the organization in question) with Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 294–95 (2007) (arguing that the requirement that one make a causal difference is merely the paradigmatic, but not the only, case of blameworthy complicity).

⁵⁷ See generally Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897 (2015) [hereinafter Sepinwall, *Conscience and Complicity*].

⁵⁸ *Id.* at 1957.

⁵⁹ Nicolas Cornell & Amy Sepinwall, *Complicity and Hypocrisy*, 19 POL., PHIL. & ECON. 154, 166 (2020).

⁶⁰ I argue elsewhere that complicity claims involve three dimensions: moral and relational (the two factors I identify in the text) as well as factual. See generally Sepinwall, *supra* note 57 (utilizing these

Instead, we have to allow that others may think some conduct wrongful even if we see it as innocent; and they may think their contribution to wrongful conduct morally implicating even if we might see that contribution as trivial or tenuous enough to make no moral difference at all.

Once we recognize that conscience-based claims are necessarily subjective, we can see the flaw in the claim that, say, a cake baker's contribution to a same-sex marriage is too tenuous to make the baker complicit in the marriage or that the owner of the Red Hen should not have viewed herself as implicated in the President's immigration policies simply by virtue of having fed his then-press secretary a meal. It does not matter that we would not assign responsibility to the baker or the Red Hen owner for serving the customers they did. What matters is that each of them takes themselves to be implicated. And if we are to have a legal regime that at least sometimes yields to an individual's conscience, then we will need to take seriously individuals' concerns about complicity even if they do not track the state's (or the moral community's) conception of right and wrong or the state's conception of what makes for a complicit connection.

With that said, to take a complicity claim seriously is not yet to conclude that it should ground an exemption. Other considerations are relevant too, including the costs to third parties of granting the exemption. But one consideration that should not be relevant is the one on which proponents of Equal Access rely—namely, that commerce is inherently amoral.

B. *The Market as a Morality-Free Zone*

The idea that the market insulates its participants from moral concerns has figured prominently in the culture wars.⁶¹ For example, one commissioner adjudicating the civil rights complaint against the baker in Masterpiece Cakeshop suggested that the baker could “believe ‘what he wants to believe,’ but cannot act on his religious beliefs if he ‘decides to do business in the state.’”⁶² And in *Hobby Lobby*, the Court contended with the claim that for-profit corporations had no conscience rights “because the purpose of such corporations is simply to make money.”⁶³ That claim appeared in the remarks of some commentators, lower court judges rejecting other contraceptive mandate challenges, and Justice Ginsburg's dissenting

three dimensions to assess the *Hobby Lobby* decision). While I maintain that respecting conscience requires that we defer to the objector's assessment of whether the conduct she opposes is morally wrong and whether the contribution she challenges relates her to that wrong in a way that would make her complicit, I deny that we must defer to her assessment of the facts.

⁶¹ See, e.g., Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 244 (2015) (“[T]he business context essentially neutralizes any potential message of endorsement.”); *supra* notes 20 and 45 and accompanying text.

⁶² Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (quoting the hearing transcript).

⁶³ Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2770 (2014) (footnote omitted). The Court's opinion refutes this claim by rehearsing the various conscientious initiatives businesses undertake, oftentimes at a financial cost. *Id.* at 2771 n.24.

opinion in *Hobby Lobby*.⁶⁴ All subscribe to the thought—typically the calling-card of efficiency theorists⁶⁵—that businesses have one and only one purpose: to maximize profits.⁶⁶ This Section responds to this amoral, avaricious picture of the marketplace, arguing that it provides cover and

⁶⁴ E.g., Brief of Constitutional Accountability Center as Amicus Curiae in Support of the Government at 25, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354); Brief of Amicus Curiae Jewish Social Policy Action Network in Support of the Government at 8–9, 14, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354); Brief of Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of the Government at 2, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Hum. Servs.*, No. 13–1144, 2013 WL 1277419, at 4 (3d Cir. Feb. 8, 2013) (Garth, J., concurring) (noting that the mission of Conestoga, “like that of any other for-profit, secular business, is to make money in the commercial sphere”) (citation omitted); *Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting).

⁶⁵ As Milton Friedman, the Chicago economist famously wrote, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase profits. . . .” MILTON FRIEDMAN WITH ROSE D. FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (2002). This view has been championed by many a law and economics scholar, to the point where Henry Hansmann and Reinier Kraakman could triumphantly declare that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.” Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001). For an overview of the scholarly ascendancy of Friedman’s position, see Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 39 (2004).

While Friedman himself allowed that the law would and should constrain businesses, such that they “engage[] in open and free competition without deception or fraud,” Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>, some of his acolytes go even further than him, arguing that managers might evade regulatory laws if doing so would enhance profits. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982) (“Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm We put to one side laws concerning violence or other acts thought to be *malum in se*.” (citations omitted)). For a trenchant critique of this position, see Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731, 1746–50 (2017).

⁶⁶ See, e.g., Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1547 (2012) (arguing that “[w]ithin for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximize shareholder wealth) must drive decisionmaking”); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Hum. Servs.*, 724 F.3d 377, 385 (3d Cir. 2013), *rev’d and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (“We do not see how a for-profit artificial being, invisible, intangible, and existing only in contemplation of law . . . that was created to make money could exercise . . . an inherently ‘human’ right.”) (internal quotations and citations omitted); *Grote v. Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting) (“So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere.”); *Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting) (“[R]eligious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. . . . [F]or-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers].”) (alteration in original) (internal quotation marks and citations omitted). For an excellent analysis demonstrating that, in *Hobby Lobby*, the Justices’ ideological positions shift, with the progressive dissenters championing a capitalist vision of the market as amoral, see Nomi Maya Stolzenberg, *It’s About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 748 (2015).

legitimation for unappealing business behavior and that it is at any rate unnecessary to the end of securing equal consumer access.

1. *The Amoral Marketplace Versus Business-with-Conscience*

In many ways, the law marks out the marketplace as amoral. For example, the Supreme Court has erected a distinction between expressive and commercial enterprises, according to which profit-making cancels out important First Amendment freedoms.⁶⁷ In a similar vein, theorists have contended that once one seeks a profit, one must “invariably” operate as a public accommodation, open to all.⁶⁸ The Court’s treatment of commercial speech, which typically receives less protection than political speech or art, also reflects a general suspicion about the capacity of the market to offer anything of non-instrumental value.⁶⁹ In short, in much law and scholarship, the privilege of hanging out a shingle rightly comes at the cost of suspending one’s conscience.⁷⁰ Moreover, the shingle in question need not be that of a business run for profit. It can include—as the anti-discrimination law

⁶⁷ *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *Cf. id.* at 636 (O’Connor, J., concurring in part and concurring in the judgment) (“Once [an association chooses to] enter[] the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.”). *See also* Lupu & Tuttle, *supra* note 39, at 285–86 (“Put more generally, a proposition crucial to religious liberty is that religions, to maintain their integrity, must and do discriminate. . . . Commercial entities do not enjoy the same protected interest in associational freedom . . .”). For a critique of the commercial/expressive divide, see Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1230 (2014).

⁶⁸ *See, e.g.*, Sepper, *supra* note 39, at 646 (“[P]rofit motive invariably identifies a place as a public accommodation.”).

⁶⁹ For a long time, commercial speech was taken to be outside the First Amendment altogether. While commercial speech is often crass, self-serving, and obfuscating, it nonetheless can serve valuable social ends, as the Court eventually recognized. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (protecting advertisement informing women about health centers willing to provide abortions). In an early case extending First Amendment protection to commercial speech, the Court noted that “[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.” *Id.* at 826. *See also* Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 322 (2007) (recognizing the value in having “those who farm organically for moral and political reasons” convey that information so that similarly minded buyers can distinguish organic and conventional products).

⁷⁰ *See, e.g.*, *supra* note 6. This view figured prominently in the amicus briefs of those supporting the gay couple’s right to a wedding cake in *Masterpiece Cakeshop*. *See, e.g.*, Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 7, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, No. 16-1111 (Oct. 30, 2017) (“The common law history supports a right of equal access to businesses serving the public. . . . A business that met this definition could not exclude any member of the public without good cause.”); Brief of the American Bar Association as Amici Curiae in Support of Respondents, 138 S. Ct. 1719, No. 16-1111 (Oct. 30, 2017) (“business owners who offer their goods and services to the public cannot claim constitutional sanctuary from public accommodations laws”). It can also be found in the amicus briefs of those opposing Catholic Social Services’ bid for an exemption in *Fulton*. *See, e.g.*, Brief of First Amendment Scholars in Support of Respondents at 17, *Fulton v. City of Philadelphia*, No. 19-123 (Aug. 20, 2020) (citing *United States v. Lee*, 455 U.S. 252, 261 (1982), for the proposition that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”).

challenged in *Fulton v. Philadelphia* does—any entity open to the public,⁷¹ under an understanding of the “marketplace” that covers retail businesses and public service agencies alike.⁷²

It is undoubtedly true that public accommodations laws prohibiting discrimination have worthy aims. To rehearse them briefly here, these laws prevent the material harms that exclusion would inflict—for example, the expense of time and money to locate a willing purveyor, or worse still the complete denial of certain goods and services. They also protect individuals from the dignitary harm of being turned away,⁷³ and they express the state’s commitment to equality.⁷⁴ Equal Access has additional benefits for all—for example, it “secure[s] the state against domestic strife and unrest, [and] preserve[s] the public safety, health, and general welfare.”⁷⁵ Finally, some states and commentators adduce a democracy-reinforcing rationale for public accommodations laws,⁷⁶ since citizens who find that they have been recruited into a society that does not offer them fair terms of cooperation might well disengage,⁷⁷ or even turn to antisocial means of attaining the goods that the existing distribution has unfairly denied them.⁷⁸

Notice, however, that the reasons for public accommodations laws lose none of their force if we abandon the vision of the market as morally neutered. We need not rule out the possibility, let alone the legitimacy, of conscientious commitments on the part of business owners in order to ensure the full operation of public accommodations laws. To see this, consider first that many of the moral commitments market players seek to enact are compatible with, and sometimes even supportive of, the egalitarian and dignitary goals of public accommodations laws. When a store owner hangs a rainbow sign in her window, or declines to sell anything but fair-trade goods, or offers to pay well above minimum wage for what would typically be a minimum-wage position, cutting into her own profit margins as a result,

⁷¹ See PHILA. CODE § 9-1102(w) (2020) (public accommodations include “services . . . extended, offered, . . . or otherwise made available to the public” as well as “all . . . services provided by . . . the City, its departments, boards and commissions.”); *id.* § 9-1106 (prohibition on discrimination).

⁷² See Brief for City Respondents at 6, *Fulton*, No. 19–123.

⁷³ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (“[T]he fundamental object of [the public accommodations provisions of the Civil Rights Act of 1964] was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”) (quoting Senate Committee Report).

⁷⁴ Sepper, *supra* note 39, at 664 n.162; Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627–28 (2015).

⁷⁵ FLA. STAT. ANN. § 760.01 (West, Westlaw through 2020 Second Reg. Sess. Of the 26th Leg.). See Sepper, *supra* note 39, at 664 n.162 (2016) (collecting other statutes with similar language).

⁷⁶ See Sepper, *supra* note 39, at 664 (collecting other statutes with similar language).

⁷⁷ Cf. Iris Marion Young, *Political Responsibility and Structural Injustice*, in LINDLEY LECTURE SERIES 1–3 (2003), https://www.bc.edu/content/dam/files/schools/cas_sites/sociology/pdf/PoliticalResponsibility.pdf.

⁷⁸ See, e.g., DANIEL HART & JAMES YOUNISS, *RENEWING DEMOCRACY IN YOUNG AMERICA* 44 (2018) (mentioning French riots against lack of educational opportunity).

she is enacting commitments to social justice and equality at least consonant with those underpinning public accommodations laws.

Second, a morally neutered conception of the market is pernicious in its own right, and we should pause to consider why. That conception invites moral complacency, if not worse.⁷⁹ It presupposes an atomism that both licenses self-interest and also overlooks much moralized market activity.⁸⁰ Take, for example, Ann Verrill, a Portland, Maine, restaurateur who, in the aftermath of the Orlando nightclub killings, posted a message on Facebook stating that individuals who owned assault rifles of the kind used in the massacre were not welcome at her restaurant.⁸¹ Of course, she might by law have had to serve them anyway, but she needn't have made them *feel* welcome.⁸² Or again, consider that the clothing company Patagonia imposes an "Earth tax" on itself, donating a portion of its revenues in the form of grants for environmental activism because, "[a]s a company that uses resources and produces waste, [they] recognise [their] impact on the environment and feel a responsibility to give back."⁸³ In January 2020, British Airways voluntarily cancelled all of its direct flights to and from mainland China to prevent international transmission of the coronavirus. The cancellations presumably came at a significant cost to the airline,⁸⁴ but, as it explained, the "safety of our customers and crew is always our

⁷⁹ Cf. Shiffrin, *supra* note 69, at 325 ("I'm not sure it is wise or desirable to adopt a theory that if publicly known, accepted, and implemented would not only treat market actors as amoral, but would encourage market actors—whether producers, advertisers, or consumers—to adopt this as a self-conception (that is, to think of themselves as amoral, apolitical agents.)").

⁸⁰ On atomism in the market, see Orts & Sepinwall, *supra* note 42, at 648–49. For examples of conscientious market activity, see *infra* text accompanying notes 81–86; Giuseppe Danese, Woke Capital (unpublished manuscript) (on file with author). See generally Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 806 (1993) (reviewing JAMES B. TWITCHELL, *CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA* (1992)) (recounting how the profit motive has eviscerated the discourse that the First Amendment was designed to protect, replacing it with "mass media" in the most literal sense of that term). There may be much truth in a critique like Collins and Skover's, but it is also bleakly cynical, and so perhaps overly apologetic.

⁸¹ Seelye, *supra* note 9.

⁸² Would Verrill have been permitted to convey her outrage in ways that caused patrons to leave, thereby achieving the result of excluding them? For an exploration of the limits of hostile speech within a commercial establishment, see Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1824 (1992).

⁸³ *Growing the Grassroots*, PATAGONIA, <http://www.patagonia.com/au/pages/environmental-grants> (last visited Aug. 8, 2020). Merck Pharmaceuticals famously produces and gives away at no cost a drug whose sole purpose is to cure river blindness in a population that has no ability to pay for the drug itself. See *Merck Offers Free Distribution of New River Blindness Drug*, N.Y. TIMES (Oct. 22, 1987), <https://www.nytimes.com/1987/10/22/world/merck-offers-free-distribution-of-new-river-blindness-drug.html>; *Over 30 Years: The Mectizan Donation Program*, MERCK (Dec. 1, 2019), <http://www.merck.com/about/featured-stories/mectizan.html> (describing Merck's program through to the present day).

⁸⁴ Cf. Sylvan Lane, *Stocks Slide After U.S. Airlines Cancel Service to China Over Coronavirus*, THE HILL (Jan. 31, 2020, 11:46 AM), <https://thehill.com/policy/finance/480886-stocks-slide-after-us-airlines-cancel-service-to-china-over-coronavirus>.

priority.”⁸⁵ These practices suggest that a good number of businesses do not think of themselves as working in an amoral sphere; instead, they authentically subscribe to an ethic of “doing well *and* doing good.”⁸⁶

Moreover, there may be instrumental reasons to promote a vision of business as morally inflected, rather than morally neutered. We can conceive of businesses as rapacious and amoral, and public accommodations laws as a necessary corrective. On that conception, businesses may well live down to our expectations.⁸⁷ Or we can conceive of businesses as sensitive and oftentimes responsive to moral considerations, driven to forego maximal profit or even sometimes to incur losses for the sake of some moral objective. On the latter view, public accommodations laws could then be seen as a backstop for the business bad apples; better still, they might be seen as continuous with the ethos that underpins the good business itself.⁸⁸

Call the model of business advanced here “business-with-conscience.” While that model acknowledges and celebrates morally responsive business practices, it is not meant to sound market triumphalism. Business-with-conscience, at least as it is currently instantiated, will hardly cure capitalist markets of their unfair distributive consequences,⁸⁹ the pressures they impose to produce too much, too cheaply, wreaking too much harm on the

⁸⁵ Rosie Perper, *British Airways Cancels All Flights to Mainland China as Wuhan Coronavirus Spreads*, BUS. INSIDER (Jan. 29, 2020, 2:43 AM), <https://www.businessinsider.com/british-airways-cancels-all-flights-to-china-wuhan-coronavirus-2020-1>.

⁸⁶ E.g., Jeff Swartz, *Doing Well and Doing Good: The Business Community and National Service*, BROOKINGS (Sept. 1, 2002), <https://www.brookings.edu/articles/doing-well-and-doing-good-the-business-community-and-national-service/> (describing Timberland’s efforts to promote volunteer work and public service). Cf. Sabine Tsuruda, *Volunteer Work, Inclusivity, and Social Equality*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 306, 311–12 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018) (rejecting the idea that civic and humanitarian aims can be the province only of volunteer work, rather than paid employment) (footnotes and internal quotations omitted).

⁸⁷ Cf. Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World*, 51 STAN. L. REV. 973, 974 (1999) (“[J]ustice is not going to be the miraculous product of a system in which none of the actors are required to pursue it.”).

⁸⁸ There is some thought that businesses are of necessity maximally profit-driven, not only because their survival requires as much, see Baker, *supra* note 41, at 985, but also as a matter of fiduciary obligation to their shareholders. See, e.g., Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991) (stating that corporations and their directors “owe fiduciary duties to shareholders and to shareholders alone”). But the view that managers must run the firm exclusively, or even primarily, in the interests of shareholders is contestable. See, e.g., Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190 (2002) (challenging arguments in favor of shareholder primacy that are “as a positive matter, inaccurate, incorrect, and unpersuasive to the careful and neutral observer”). Moreover, even if true, the assumption that shareholders themselves care only about profits reproduces the same presumptions about amorality that the conception of morally-inflected business practices advanced here aims to displace.

⁸⁹ See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 1 (Arthur Goldhammer trans., 2014) (“When the rate of return on capital exceeds the rate of growth of output and income. . . capitalism automatically generates arbitrary and unsustainable inequalities that radically undermine the meritocratic values on which democratic societies are based.”).

environment,⁹⁰ or most of the other ills for which they are rightly criticized.⁹¹ Still, there is no point in denying that businesses can and sometimes do good. The morally neutered view of the market that exemption opponents advance is not necessarily accurate, certainly not unavoidable, and perhaps not even helpful to the progressive egalitarian agenda.⁹²

With that said, one might concede that it is all to the good if a business adheres to *higher* moral standards than the law requires—for example, by holding itself to greener practices than current environmental regulations mandate. But the cases where store owners want to discriminate for conscience-based reasons involve deviating *downward* from what the law (and arguably political morality) requires by refusing equal treatment for the sake of the owners’ personal commitments. Is it nothing but rhetorical sleight of hand to trumpet these store owners as paragons of moral conscience?

2. *Common Carriers and Discrimination*

One way to motivate the thought that no form of discrimination can count as conscientious emerges from Joseph Singer’s path-breaking work recovering and reconceptualizing public accommodations law. Singer offers a fascinating discussion of the historic origins of this body of law, pitting a “monopoly” explanation against a “holding-out” explanation.⁹³ The former—now ascendant—holds that common carriers were bound to serve all-comers *only* because they enjoyed a monopoly; as such, no such duty need accrue to businesses operating in a market where there are competitors.⁹⁴ The latter explanation—now forgotten, Singer writes—grounds universal access in a moral duty: one who “put[s] out [a] sign” or holds himself out to the public as a business open for customers is bound to accept everyone; to do otherwise would be to succumb to “prejudices []

⁹⁰ See, e.g., Frederick Engels, *The Part Played by Labour in the Transition from Ape to Man*, MARXISTS (May–June 1876), <https://www.marxists.org/archive/marx/works/1876/part-played-labour/> (“What cared the Spanish planters in Cuba, who burned down forests on the slopes of the mountains and obtained from the ashes sufficient fertilizer for one generation of very highly profitable coffee trees – what cared they that the heavy tropical rainfall afterwards washed away the unprotected upper stratum of the soil, leaving behind only bare rock!”).

⁹¹ See, e.g., MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012) (highlighting various examples of societal harm arising through commodification).

⁹² A related point has been raised in defense of Catholic Social Services’ conscience claims in *Fulton v. City of Philadelphia*. For example, James Campbell argues that Philadelphia is disserving needy children “by eliminating agencies that operate consistently with traditional Catholic (and similar religious) beliefs about marriage, thereby reducing foster-care resources in the midst of an existing shortage.” James Campbell, *Symposium: Philadelphia’s Exclusion of Faith-Based Foster Agency Departs from History and Undermines Interests of Children*, SCOTUSBLOG, (Oct. 29, 2020, 11:16 AM), <https://www.scotusblog.com/2020/10/symposium-philadelphias-exclusion-of-faith-based-foster-agency-departs-from-history-and-undermines-interests-of-children/>.

⁹³ Singer, *No Right*, *supra* note 6, at 1401–08.

⁹⁴ Singer, *Sodom*, *supra* note 39, at 938–39.

unworthy of our better manhood.”⁹⁵ Singer explains further that the monopoly rationale has a dubious origin, propelled as it was by Lochnerian economic liberty and Jim Crow racism. And it is morally dubious to boot because it locates the wrong of discrimination in the inconvenience it imposes rather than the dignitary harm of being treated as if one is a member of a lower caste.⁹⁶

In place of the libertarian picture, under which businesses have unfettered rights to refuse service in a competitive marketplace,⁹⁷ Singer urges a return to the holding-out picture. In this picture, store owners cannot, for any reason, refuse anyone willing to accept the commercial offer the store extends. This picture ensures not only that members of protected classes will be guaranteed service but so too anyone with the means and willingness to pay for the store’s goods and services.⁹⁸ But notice the implication of this absolutist view: Singer’s picture would require a reception hall owner to rent her space to the NAACP and KKK alike. By contrast, the owner could decline the KKK rental but not the NAACP on the model of business-with-conscience. Why might one then prefer Singer’s picture?

Singer offers an argument rooted in pre-legal moral commitments. He writes, “civil rights laws do not limit property rights. They define what property rights can exist in a free and democratic society. They establish the structural baseline, the infrastructure of a society that is committed to granting equal protection of the laws.”⁹⁹ The holding-out picture would then make civil rights laws conceptually and normatively prior to property rights, whereas the business-with-conscience model is compatible with viewing state public accommodations laws as super-imposed upon existing property entitlements.

There is undoubtedly something appealing in Singer’s genealogy: it allows us to say to the person who insists that anti-discrimination laws violate her property rights that her property rights never included the right to discriminate in the first instance. But that rhetorical advantage has to be

⁹⁵ Singer, *No Right*, *supra* note 6, at 1410. The holding-out notion is not completely absent from recent doctrine. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (“Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please.”).

⁹⁶ Singer, *Sodom*, *supra* note 39, at 938 (“The idea that one can ‘just go elsewhere’ misses the point entirely. The question is not whether one can find a store willing to let you in and treat you with dignity. The question is whether one has a right to enter stores without worrying about such things.”). *See also* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 292 (Goldberg, J., concurring) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public”) (internal quotation marks omitted).

⁹⁷ *See, e.g.*, Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1290 (2014) (arguing that business owners should be permitted to discriminate so long as would-be customers can be served elsewhere).

⁹⁸ Some states take this absolutist stance when it comes to housing too, forbidding refusals on conscience-based grounds to anyone. *See, e.g.*, *Swanner v. Anchorage Equal Rts. Comm’n*, 874 P.2d 274, 279–80 (Alaska 1994) (holding that the Free Exercise clause does not permit landlord to refuse to rent to unmarried couples in violation of antidiscrimination statute).

⁹⁹ Singer, *Sodom*, *supra* note 39, at 947–48 (footnote omitted).

balanced against the practical upshot of conceiving of business property as a belated development, beholden to Singer's structural baseline. And the most egalitarian understanding of that baseline would prohibit every refusal of service.

I think this goes too far. Compelled universal access recruits store owners into supporting projects they—oftentimes rightly—have reason to oppose (such as the legally authorized but morally troubling marriages of underage girls).¹⁰⁰ And it deprives individuals of meaningful work lives. Work can already be alienating, in any number of ways, even if one is self-employed. Even the most enriching of jobs can come with its fair share of grunt work and tedium. Business realities might compel the person who owns her own store or restaurant to put up with conduct that she would not otherwise tolerate (e.g., from berating customers, leering suppliers, hot-tempered talent in the kitchen, and so on). Why shouldn't she want to deny her blood, sweat, and tears to individuals or endeavors she has reason to oppose? To be sure, many individuals lack the kind of workplace autonomy that would allow them to choose their clientele. This is surely a problem in its own right.¹⁰¹ But for those who do enjoy such autonomy, it seems desirable to allow them to exercise it.

In Part III, I advance a new understanding of public accommodations laws that would allow businesses to refuse service to people who seek a store's wares for projects promoting hate, even if those projects are connected to the putative customer's protected characteristics (e.g., a member of the Christian KKK church wants to rent a reception hall for his church's banquet). But first we must see why the Equal Access policy, like Singer's holding-out account, sweeps too broadly and, worse still, fails to offer robust protection to the very minorities it is designed to serve.

II. THE UNEQUAL ASPECTS OF EQUAL ACCESS

Equal Access holds that a public accommodation may not provide a good or service to one person that it would deny to another. That principle received explicit endorsement in the Supreme Court's decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.¹⁰² And indeed the role it played there belies the widely accepted view that *Masterpiece* was

¹⁰⁰ See *infra* notes 153 and 183–86 and accompanying text.

¹⁰¹ See, e.g., Elizabeth Anderson, *Private Government*, in LIBERTY, EQUALITY, AND PRIVATE GOVERNMENT 94, 95–96 (2015) (describing how the modern workplace functions like a dictatorship).

¹⁰² 138 S. Ct. 1719 (2018). See *supra* note 21 (citing the opinions of Justices Kagan, Gorsuch, and Ginsburg, each of whom adhered to a version of this principle).

a non-decision¹⁰³—narrow and *sui generis*, or even a “punt.”¹⁰⁴ To be sure, the Court did not rule on the central question in the case—namely, whether a vendor may refuse, on free exercise or free speech grounds, to provide a custom-made product, especially one that has words or artistry. Instead, the Court found that the Colorado proceedings were infected by prejudice and so vacated the decisions below.¹⁰⁵ But in finding that Colorado had acted with “hostility to religion,”¹⁰⁶ the Court relied heavily on Equal Access.¹⁰⁷ So too has virtually every other court in justifying the requirement that a place of public accommodation offer members of a protected class the very same products or services that it offers to others.¹⁰⁸ And yet, as this Part argues, Equal Access is bound to lead us astray.

What then explains its grip? Equal Access would be a passable rule of thumb if one wanted to identify, say, the distinctive wrong of the lunch counter owner who refused to serve Black people in the Jim Crow South. The lunch counter has a set menu; in offering the menu items to white people but not Black people, the owner impermissibly discriminated on the basis of a protected characteristic. So, contrary to Equal Access, the owner denied one party the qualitatively same good it could readily have had available and willingly provided to another. Even there, however, one might want something that more richly conceptualized the nature of the exclusion—capturing the fact that the basis of the exclusion was an immutable, ascriptive characteristic; or, better still, one might point to the way in which the exclusion reinforced the subordination of an already oppressed group.¹⁰⁹ After all, refusing to serve all Black people has a unique significance and

¹⁰³ See, e.g., Christine Emba, *The Supreme Court Wasn't Ready to Decide on the Wedding Cake. Neither Are We.*, WASH. POST (June 5, 2018, 7:34 PM), https://www.washingtonpost.com/opinions/the-supreme-court-wasnt-ready-to-decide-on-the-wedding-cake-neither-are-we/2018/06/05/55c890f8-6905-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.0bc495192b55 (calling the decision “half-baked”).

¹⁰⁴ Mark Joseph Stern, *Gay Americans Have Little to Fear from the Supreme Court's Compromise in Masterpiece Cakeshop*, SLATE (June 4, 2018, 11:54 AM), <https://slate.com/news-and-politics/2018/06/the-supreme-courts-decision-in-masterpiece-cakeshop-is-a-kennedy-compromise.html>.

¹⁰⁵ *Masterpiece*, 138 S. Ct. at 1732.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1727.

¹⁰⁸ For example, in *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), the New Mexico Supreme Court illustrated the principle enshrined in its Human Rights Act (NMHRA) as follows: “If a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers. The NMHRA does not permit businesses to offer a ‘limited menu’ of goods or services to customers on the basis of a status that fits within one of the protected categories.” *Willock*, 309 P.3d at 62. See also *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 428–29 (N.Y. App. Div. 2016) (quoting the *Elane* language just cited as support); *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051, 1061 (Or. Ct. App. 2017) (describing the nature of the discrimination in this way: “Sweetcakes provides a service—making wedding cakes—to heterosexual couples who intend to wed, but it denies the service to same-sex couples who likewise intend to wed.”). But see *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 926 (Ariz. 2019) (holding that custom invitations were pure speech and public accommodations ordinance requiring service would then constitute compelled speech in violation of the First Amendment).

¹⁰⁹ See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 123–24 (1976).

sting—different, for example, from a refusal to serve, say, the father of the bully who had recently bested the lunch counter owner’s son in an unsportsmanlike contest. But still, as a first cut, Equal Access tracks at least a part of the wrong of anti-Black policies. It captures the intuitive idea that we ought to treat likes alike.¹¹⁰

Where Equal Access works, it works because the would-be customers will make the same use of the products or services on offer. The two individuals who seek to be served at the lunch counter typically want the same experience or endpoint—the consumption of a meal. There is no difference in their purpose, and, as I have argued, a difference in purpose in fact grounds an important distinction in what a putative customer asks of a vendor. Think again of renting one’s hall for a KKK rally relative to an NAACP event.

Further, it is not just that Equal Access is over-inclusive, forbidding refusals of service that the law ought to allow; it is also under-inclusive, permitting discrimination against some individuals who should be protected. Moreover, in other cases still, the principle fails to yield determinate results, since the question of whether two objects are the “same” is one the principle does not illuminate. Finally, the principle rests on a logical fallacy. I elaborate on each of these in turn, beginning with the principle’s logical flaws.

A. *Equal Access Rests on a Logical Fallacy*

The Equal Access principle is meant to distinguish between permissible and impermissible refusals of service, especially when it comes to the vendor’s inventory or repertoire. A vendor offends against no one, the thought goes, if he refuses to provide a good or service that he does not take to be a part of what he is in the market to sell. So, a cake baker who refuses a customer’s order for brisket, or a massage therapist who refuses a patron’s request for a haircut, does not impermissibly discriminate, even if the person making the request is a member of a protected class. Neither the baker nor the massage therapist has held themselves out as purveyors of the requested

¹¹⁰ Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (“A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”). Of course, Wechsler had an overly rigid conception of “generality,” which abstracted from considerations that in fact relevantly distinguished the cases he critiqued, as Louis Pollak convincingly showed. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 32–34 (1959). The critique of the neutral principle doctrine offered here is a specific version of Pollak’s larger complaint—principled decisions should be attuned to the particulars, especially particulars having to do with race or other dynamics sustaining inequality.

good or service. As it is often put, the vendor in question “would not sell the requested [product or service] to anyone.”¹¹¹

That principle proved decisive in distinguishing between the Colorado cake baker in *Masterpiece* who, for religious reasons, refused to provide a cake for a same-sex wedding, and a second Colorado cake baker who, for secular moral reasons, refused to provide a cake with religious anti-gay messages. The second case was brought by William Jack, a fundamentalist Christian, who requested two cakes from Azucar bakery—one with an image of an X-ed out gay couple and the other with a biblical verse decrying homosexuality.¹¹² When the owner of Azucar, Marjorie Silva, refused to provide either cake, Jack filed a complaint with the Colorado Civil Rights Commission. Applying its Equal Access principle, the Commission held that Azucar did not violate Colorado’s public accommodations law in refusing because Silva would not have supplied anti-gay cakes to anyone; her refusal was predicated on the nature of the cake that was sought, not the identity of the customer seeking it.¹¹³ In this way, Silva was like the baker who refuses to provide a Jewish customer with a brisket—not because that baker does not serve Jews but because that baker does not serve briskets. Justice Kagan affirmed the distinction between Phillips and Jack on the ground that “[a] vendor can choose the products he sells but not the customers he serves.”¹¹⁴ While that principle seems compelling on its face, it actually turns on a logical fallacy, which we can see if we break it down:

Principle 1: If a vendor, V, does not sell briskets to anyone,
then V does not offend against a particular customer C when
V refuses to sell a brisket to C.

Principle 2: If V does sell briskets to some customers then
he offends against C when V refuses to sell a brisket to C.¹¹⁵

¹¹¹ *Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1733 n.*, 1735 (2018) (Kagan, J., concurring).

¹¹² See, e.g., Brief of Amici Curiae William Jack and the National Center for Law and Policy in Support of Petitioners at 5, *Masterpiece*, 138 S. Ct. 1719 (No. 16-1111), http://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_william_jack_et_al.pdf. Jack is not the only one aiming to turn the tables on bakers who support equal rights for members of the LGBTQ community. In a bid to expose hypocrisy, some in the “anti-gay community” are ordering “‘Gay Marriage Is Wrong’ cakes from gay-friendly bakeries.” Isabelle Chapman, *Colorado Bakery Facing Legal Action After Refusing to Make Anti-Gay Cake*, AOL (Jan. 20, 2015, 1:04 PM), <https://www.aol.com/article/2015/01/20/colorado-bakery-facing-legal-action-after-refusing-to-make-anti/21132364/>.

¹¹³ See, e.g., John Corvino, *Drawing a Line in the ‘Gay Wedding Cake’ Case*, N.Y. TIMES (Nov. 27, 2017), <https://www.nytimes.com/2017/11/27/opinion/gay-wedding-cake.html> (discussing the Colorado Civil Rights Commission’s ruling).

¹¹⁴ *Masterpiece*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring).

¹¹⁵ Formally, Principle 2 is the inverse of Principle 1. But one cannot validly infer the inverse of a principle from the original; one can only validly infer the contrapositive. All of this should be familiar from LSAT studying (though apparently lost on established jurists). See, e.g., *Conditional Reasoning and Logical Equivalence*, KHAN ACAD., <https://www.khanacademy.org/test-prep/lsat/lsat-lessons/logic-toolbox-new/a/logic-toolbox--article--conditional-reasoning-logical-equivalence> (last visited Aug. 6, 2020).

Principle 2 is effectively a version of Equal Access. The problem is that Principle 2 is supposed to *derive* from Principle 1, when in fact Principle 1 does not logically compel Principle 2. Compare: if there are no eggs in the house, you cannot make a meringue. If there are eggs in the house, then you can make a meringue. Or: if the car has no gas, it cannot be driven. If the car has gas, it can be driven. Or again: if you do not have a date for the prom, you will feel awkward attending. If you have a date for the prom, then you will not feel awkward attending. In all of these cases, the first proposition has an antecedent that states a necessary condition for the consequent—meringues require eggs; cars require gas; non-awkward proms (let's imagine) require dates. But necessary conditions are oftentimes not sufficient—meringues also require sugar; cars need inflated tires and working parts; proms require winning personalities, decent dance skills, and smooth repartee if they are not to feel awkward (for some of us anyway). By the same token, getting one's hands on a brisket requires a purveyor of briskets. But that is not all: a customer may purchase a brisket from its purveyor only if she has the money to pay, she is wearing shoes, she is not smoking in the store, etc. The problem, generally stated, is this: in each of the foregoing cases, the second principle is the inverse of the first and it is a central tenet of propositional logic that you cannot establish the truth of a conditional proposition simply by inverting another conditional proposition you know to be true. But that is just how courts and commentators proceed in deriving Equal Access. Again, they hold that vendors may decline to sell someone a good that they would not sell to anyone else; but once a vendor does sell that good to someone, he must sell it to everyone else. That progression of thought presupposes that the *only* reason to turn someone away is because one does not sell the product they are requesting to anyone. But that is not a claim that courts or commentators can *presuppose*; instead, it is precisely the claim that stands in need of argument. Of course, there could be compelling reasons not to refuse any customer a good or service that is the same as one the seller has sold or would sell to someone else. But what then counts as the "same"?

B. *Problems with Treating Two Goods As "Alike"*

Equal Access prohibits denying one customer a good or service that is the same as a good or service the vendor offers another customer. Applying this principle immediately thrusts one into a tangled web of problems around discerning when two products count as the "same." One can readily see that goods or services might come in endless varieties and which of these are sufficiently similar to those the vendor holds himself out as providing and which are not already raises difficult issues. For example, if a baker offers

cakes decorated in all of the shades of the rainbow must he then agree to create a rainbow cake?

But now let us suppose that a customer wants a product that common sense tells us is the same product as one the vendor has sold in the past—it is identical in appearance and composition to that other product and, were the two to have sat on the store’s shelf at the same time, a customer would have had no reason to prefer one to the other. There might nonetheless be a meaningful difference between them. Consider, for example, two cakes, identical in all respects, each bearing the words “Yay, KKK!” Do the two satisfy the same-product requirement of Equal Access if the first cake is for a celebration of the three Kardashian sisters and the second a celebration of the Ku Klux Klan? Here, even though the words are the same, the referent of “KKK” is different. Why shouldn’t they count as different such that denying the Christian KKK customer his cake does not run afoul of Equal Access? Nor could we be assured that two cakes were the same even if they were identical in appearance and the intended meaning of whatever words they bore was the same too. A baker has reason to care that his “Congratulations!” cake will be served at the KKK banquet rather than some more benign event. Insofar as Equal Access cannot recognize that sometimes the event at which a product will be served (or used) informs the nature of the product that it is (i.e., whether it is the same as some identical-looking product), Equal Access sweeps too broadly.

But so too is Equal Access underinclusive, permitting refusals of service that it should forbid. For once we allow a vendor unilateral authority to control just what products he offers, there is no reason why he might not forego product lines precisely in order to discriminate against protected individuals. Take, for example, a baker who harbors gay animus and so decides that he will not make rainbow cakes for anyone. Equal Access would have to countenance the baker’s decision. But that would be to miss the fact that there is an expressive slight in denying a gay customer a rainbow cake that is absent when the baker denies a rainbow cake for, say, an eight-year-old’s birthday party. Put differently, surely the appropriate way to judge this baker’s refusal is not to compare what he would or would not be willing to serve to other customers; it is just to ask whether he has turned someone away on the basis of a protected status.¹¹⁶

Indeed, Equal Access contains the seeds of its undoing precisely because it focuses on treating likes alike. In that way, it builds in a loophole for any vendor who can make the case that his wares are customizable—or, more compelling still, unique creations. For these vendors, it will never be the case that one product is the same as any other. And, since Equal Access requires only that the vendor not refuse a product to someone when the vendor has

¹¹⁶ On the relationship between status and conduct, see *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 696 (2010).

offered the *same* product to others in the past, the vendor who never offers the same product twice necessarily never violates Equal Access.

The point holds as well in that part of the “marketplace” where patrons procure public services.¹¹⁷ Take the now-pending case of *Fulton v. City of Philadelphia*, where Catholic Social Services (CSS) is challenging Philadelphia’s refusal to have CSS serve as a foster placement agency because CSS will not place children with same-sex couples. CSS’s position would seem to be a straightforward case of invidious discrimination, but it is not one that Equal Access can recognize: Under Equal Access, CSS could be found to have discriminated only if it declined to place a child with a same-sex couple where it had, or would have, placed a similar child with a relevantly similar opposite-sex couple.¹¹⁸ But if a custom-made cake qualifies as unique, *a fortiori* a given child or couple or family or living situation is unique too¹¹⁹ (even the happy ones, with no disrespect to Tolstoy).¹²⁰ More generally, given any fact-intensive function or personalized service, the details of that function or service will necessarily be tailored to the party being served. As such, there will never be a relevant precedent with which to compare a challenged refusal of service in order to know if the present party has been the target of discrimination.

Note finally that Equal Access gets the inquiry about what goods a vendor must provide backwards. In deciding whether a vendor can supply the requested product a patron requests, the vendor does not ask himself, “Is the requested product (or service) the same as (or even relevantly similar to) products I have provided to others in the past?” Instead, he contemplates the meaning for him of the requested product on its own terms. The question is, “Can I provide the requested product in good conscience?” If he determines that he can, then—but only then—will he conclude that the requested product is relevantly similar to others he has offered in the past. In this way, sameness or similarity is epiphenomenal. It is the *outcome* of an inquiry about the moral meaning of a good or service, not a consideration that informs that outcome. Two goods or services are relevantly similar insofar as neither provokes a conscientious objection. But in determining whether a

¹¹⁷ See Brief of Amici Curiae Legal Scholars in Support of Equality in Support of Respondents at 27, *Fulton v. City of Philadelphia*, No. 19–123 (Aug. 18, 2020) (suggesting that foster agencies operate in the “marketplace.”).

¹¹⁸ See *supra* note 22.

¹¹⁹ Thus, a federal district court approvingly quoted foster guidance stating that “[a] holistic assessment is essential to achieve the intent of each section and make final recommendations regarding placement and permanency for children. All families are unique; these questions are not one size fits all.” *Blais v. Hunter*, No. 2:20-cv-00187-SMJ, 2020 WL 5960687, at *9 (E.D. Wa. Oct. 18, 2020), available at <https://www.courtlistener.com/recap/gov.uscourts.waed.90879/gov.uscourts.waed.90879.56.0.pdf>. See also *id.* at *12.

¹²⁰ LEO TOLSTOY, *ANNA KARENINA*, Ch. 1 (Constance Garrett, trans., 1998) (1878) (ebook) (“Happy families are all alike; every unhappy family is unhappy in its own way.”)

good or service provokes a conscientious objection, the vendor need not appeal to past practice at all.

In sum, Equal Access's focus on comparing a requested product or service to those the vendor has offered, or would offer, is wrong-headed for many reasons. At bottom, it does not track what we, and the law, should care about. What matters is not that the vendor proceed consistently (assuming, contrary to what we have seen, that we can come up with a coherent, principled conception of what counts as being consistent); what matters is whether he is treating his patrons with the respect they deserve, no matter how the vendor dealt with others in the past. Equal Access does not provide an evaluation on that basis.

III. THE MARKET AS A HATE-FREE ZONE

How then should we conceptualize impermissible discrimination in the marketplace, especially once we recognize, as I have urged,¹²¹ that conscience has a legitimate role to play therein? I divide the analysis here between the provision of commercial goods and services, on the one hand, and public services, on the other. Thus, in Section III.A, I argue that anti-discrimination laws should in general trump conscience in the retail sphere. In Section III.B, I argue that the prohibition against discrimination is even stronger in the case of public service provision.

But I do not adopt the Equal Access, or "holding-out," policy critiqued above.¹²² Instead, in Section III.C, I defend refusals of service for products or services that would be used in projects involving hate. Paradigmatic here would be a refusal to supply goods or services for a KKK event, whether the KKK group is affiliated with a religious or secular supremacist group. I argue that we should see refusals that respond to the hateful projects of putative customers not as deviations from the egalitarian ethos of Equal Access but instead as continuous with and supportive of that ethos. In Section III.D, I consider the implications of this more nuanced policy of refusing service for public service providers.

A. *No Exemptions from Serving Protected Classes in Commerce*

To begin, it is worth noting that every exemption is an accommodation that recruits the community in promoting the personal commitments of the exempted party.¹²³ Exemptions release the exempted party from one of his political obligations. The rest of us must continue to obey the law, even if

¹²¹ See *supra* Part I.

¹²² See *supra* Section I.B.2.

¹²³ See SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY AND THE LAW* 158 (2014) (defining accommodations as "social practice[s] in which we absorb some of the costs of others' free and morally relevant choices in order to acknowledge, create room for, lift barriers to, facilitate, or convey a message about their choices").

many of us might prefer not to.¹²⁴ Further, the exemption may impose material costs on others. Given the potential third-party costs of an exemption, the typical case—seeking, for example, to be released from the draft, or Sunday Sabbath laws, or compulsory education—should then involve a balancing test, weighing (1) the objector’s burden of complying with the challenged legal requirement *against* (2) the strength of the obligation to obey laws of that kind and also the costs that an exemption would inflict on discrete third parties.¹²⁵ But where the conscientious objector seeks an exemption from an anti-discrimination law, balancing has no place; the state should categorically refuse.

This is because the logic of anti-discrimination protections cannot sustain exceptions. Again, these protections convey that, in the public sphere, discrimination is categorically wrong. The Court in *Hobby Lobby* recognized as much when it said that “prohibitions on racial discrimination” (which can be evaded only under strict scrutiny) “are precisely tailored to achieve th[e] critical goal [of eradicating racism].”¹²⁶ In other words, the state cannot have a society wherein there is no racism if it sometimes permits racism.¹²⁷ The same holds true for discrimination against members of other protected groups.

Still, an exemption supporter might concede the importance of equality but then point out that equality can be cashed out in different ways. A regime in which everyone is entitled to turn others away on the basis of genuine and deeply held conscientious convictions enshrines a version of equality too: each of us is equally empowered to exercise their conscience as they see fit, which means, in particular, that each of us is equally empowered to decide, on the basis of conscience, whom they will or will not serve.¹²⁸ Indeed, much

¹²⁴ See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1255 (1994) (noting that those with political or other non-religious commitments are not provided the same “governmental arrangements” as those with religious commitments).

¹²⁵ This is a gloss on Sepinwall, *supra* note 57, at 1966–79. For other work urging more serious attention to third parties, see Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 470–74 (2014).

¹²⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014).

¹²⁷ In *State v. Arlene’s Flowers, Inc.*, a case where a florist had denied her services for a same-sex wedding, the Washington Supreme Court offered a definitive statement of this principle, noting that other courts had done the same:

[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches. As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined.

441 P.3d 1203, 1235 (Wash. 2019) (alteration in original) (footnote omitted) (citation omitted) (internal quotations omitted).

¹²⁸ See David Velleman, Comment, *Same-Sex Weddings* (forthcoming) (manuscript at 3) (draft on file with author).

current public accommodations law already operates in just this way, as we have seen.¹²⁹

I believe that there are at least four reasons to reject a regime that would allow every business *carte blanche* to decide, on conscientious grounds, whom to serve and whom to turn away. First, such a regime would court balkanization. Our world would devolve into a series of segregated enclaves, where each of us interacts only with others who share our beliefs, or our lifestyles, or our family values, or our race, religion, ethnicity, and so on. There is perhaps something comfortable about that world but there is also something troubling about it: for one thing, it prompts us to reduce people to the traits we do not like about them. The relevant fact about Charlie Craig—the customer turned away in *Masterpiece*—is his sexual orientation, not his job, his hobbies, or the fact that he brought his mother to the bakery to help him select a wedding cake. By contrast, compelled service might weaken some of the existing divisions. Thus, interacting with Craig, rather than turning him away, might have allowed Phillips, the baker, to see Craig more fully, in ways that would humanize him in Phillips's eyes (and vice versa for the salutary effects that interacting with Phillips might have had for Craig).

Second, we should recognize that a refusal of service has a different meaning than a government requirement to serve. For example, a wedding vendor's refusal can legitimately be read as an expression of contempt—and, for the reasons above, contempt not just for the same-sex couple's choice to marry but for who they fundamentally are (marriage being central to a reasonable conception of the good life).¹³⁰ On the other hand, if the

¹²⁹ See *supra* notes 81–82 and accompanying text.

¹³⁰ Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (noting the “centrality of marriage to the human condition” and stating that “marriage is essential to our most profound hopes and aspirations”). Many of the state court wedding vendor decisions insist on denying a difference between refusing service for a same-sex wedding and refusing service on the basis of sexual orientation. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (“[W]hen a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation.”). The position is consistent with the U.S. constitutional law doctrine rejecting distinctions between a protected status and conduct closely correlated with that status. See, e.g., *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 695 (2010); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . .”). Cf. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”). Interestingly, Britain’s Supreme Court has come out the other way, upholding the right of a baker to refuse to make a cake with a pro-same-sex marriage message, and insisting that “[a]lthough the person who requested the cake was gay, . . . the bakery owners’ refusal was based not on his sexual orientation, but on their Protestant faith’s opposition to gay marriage.” Ed O’Loughlin, *Belfast Bakery Was Free to Refuse Baking Gay-Marriage Cake*, *Supreme Court Rules*, N.Y. TIMES, Oct. 11, 2018, at A4.

Sensitive to the sting of being turned away, Douglas Laycock has proposed “a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.” Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 198–99 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008). To the extent that the proposal would normalize opposition to same-sex marriage (which, for many, is tantamount to opposition to same-sex individuals), it is hard to see how the proposal would not wage a dignitary harm at least as severe.

government compels the vendor to provide service, the government does convey that it privileges equality over religious freedom. But I suspect that the expressive sting is less acute.¹³¹ For one thing, there is something especially confronting about having another person tell you, to your face, that you are not the kind of person he will serve.¹³² For another, the vendor can broadcast his opposition to same-sex marriage in other ways.

Third, compelled service is dialogue-enhancing, whereas refusing service is not. If the vendor has a right to immediately eject those whom conscience will not permit him to serve, conversation will be foreclosed. But if the law instead compels the vendor to provide service, then there is at least in principle an opportunity for dialog to ensue. For example, if the baker in *Masterpiece* had been compelled by law to serve the gay couple, he could nonetheless have sought to have the couple release him from his legal obligation by explaining his objection.¹³³ By the same token, the couple could perhaps have presented their relationship in ways that would have made it comfortable for the baker, and perhaps even worthy of his support.¹³⁴ We might see these in-store dialogs as the modern equivalent of the discursive exchanges of the town square of yore, where conversation and commerce flowed together, smoothing over difference.¹³⁵

Finally, and most significantly, a regime permitting conscientious exemptions risks creating minority oppression. It would be one thing if the conscientious commitments in question were idiosyncratic and distributed randomly across the population. For example, the bar on that corner will not

¹³¹ But see Laycock, *supra* note 130, at 198 (“In my view, the right to one’s own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience.”).

¹³² See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (stating that public accommodations laws “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments”) (internal quotation marks omitted); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (stating that antidiscrimination laws “guarantee that ‘a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man’”); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 138–41 (2014).

¹³³ Addressing the wedding vendor cases specifically, Andrew Koppelman has defended conscientious exemptions for wedding vendors who oppose same-sex marriage on the ground that the LGBTQ community should be “magnanimous in victory.” Koppelman, *supra* note 74, at 628. But it is one thing for a person to exercise magnanimity of their own accord and quite another for the law effectively to impose it, by formally exempting vendors from their obligations under public accommodations laws.

¹³⁴ Cf. *Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical*, PEW RESEARCH CTR. (June 26, 2017), <http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/> (reporting on a 2017 survey finding changing attitudes in favor of gay marriage among members of the same demographic group—for example, “47% of white evangelical Millennials and Gen Xers—age cohorts born after 1964—favor same-sex marriage, up from 29% in March 2016”).

¹³⁵ See, e.g., ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS* 139 (1986) (presenting the idea of “*doux commerce*,” which posits that increases in market activity promote a peaceful society and better manners). Cf. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 90 (1980) (“[S]hopping center owners . . . open[] their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks.”) (Marshall, J., concurring).

serve Eagles fans; the bar on this corner will not serve lawyers; and that bar over there will not serve individuals with curly hair. Many people would then face occasional denials of service, but these would feel arbitrary and so not stigmatizing. But, if we allow people to deny service to members of protected classes, we can expect that many will, and the aggregate effect will be to create or reinforce stigma.¹³⁶ Indeed, it is just to prevent this outcome that we have protected classes.¹³⁷

For all these reasons—the last especially—we should reject a policy under which business owners can turn anyone away so long as they do so on the basis of sincere conscientious convictions.

B. *No Exemptions for Public Service Providers*

If the state may interfere with private commercial entities in order to prohibit discrimination, one would have thought that, *a fortiori*, it may impose the anti-discrimination regulations to which *it* is bound on the agencies with whom it contracts to carry out its functions.¹³⁸ But there is reason to think that a majority of Justices will find otherwise,¹³⁹ and even progressives may be without the resources to impose a categorical ban on conscientious refusals.¹⁴⁰

As discussed above, the Supreme Court is poised to decide *Fulton v. Philadelphia*, in which Catholic Social Services challenges the city's refusal to contract with CSS for the provision of foster care. The city insists that its foster agencies abide by its anti-discrimination law, which prohibits

¹³⁶ See, e.g., *Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (noting that widespread exemptions would result “in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations”); NeJaime & Siegel, *supra* note 6, at, 215 n.64, 224 (2018) (citations omitted); ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 30–31 (1996).

¹³⁷ The legislative history of Title II of the Civil Rights Act suggests this view. “[N]o action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from . . . public accommodations and facilities.” 109 CONG. REC. 11158 (1963). See also Jonathan Gingerich, *Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies*, 11 NE. U. L. REV. 401, 457 (2019) (“In almost all jurisdictions . . . businesses can arbitrarily exclude members of the public, refusing to . . . sell them goods or services, provided that the exclusion is not based on one of several grounds specifically proscribed in a public accommodation statute (such as race, gender, age, sexual orientation, marital status, and employment by the military).”).

¹³⁸ See, e.g., Kindall, *supra* note 46 (“The First Amendment does not require governments to use private contractors who refuse to provide the contracted services on a nondiscriminatory basis.”). For an interesting history of how social workers and others administering foster care *violated* state regulations, as a matter of conscientious conviction, in order to place foster children with LGBTQ+ parents at a time when the rules officially disqualified them, see Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363 (2016).

¹³⁹ See, e.g., Natalie Hope McDonald, *With Fulton v. Philadelphia, U.S. Supreme Court is Poised to Decide a New LGBT Rights Issue*, PHILLY VOICE (Nov. 14, 2020), <https://www.phillyvoice.com/us-supreme-court-fulton-vs-philadelphia-lgbt-right-catholic-social-services-discrimination/> (noting that there are now six conservative Justices on the Court and they seem to be leaning in favor of CSS).

¹⁴⁰ See *infra* text accompanying notes 144–50.

discrimination on the basis of sexual orientation, and CSS will not certify same-sex couples as a matter of its religious convictions.

The most compelling reason CSS has for contesting the city's refusal to contract alleges that the refusal involves an unconstitutional condition: the city requires CSS either to abandon (or speak against) its religious beliefs, as a condition of providing foster care.¹⁴¹ Respondents¹⁴² and their progressive supporters¹⁴³ deny that there is an unconstitutional condition here. But the Respondents' position sits uncomfortably alongside the position progressives have taken in a different set of cases—this one involving challenges to state laws that would deny government contracts to entities that support the Boycott, Divest, and Sanction (BDS) movement against Israel.¹⁴⁴ In the latter set of cases, progressives have argued that the state imposes an unconstitutional condition when it requires that entities contracting with the state forswear support for the BDS movement.¹⁴⁵ On its face, there appears

¹⁴¹ See, e.g., Petition for a Writ of Certiorari at 34, *Fulton*, No. 19–123 (“The City’s actions here place unconstitutional conditions on CSS’s first amendment activities: the City is threatening to deny CSS the ability to provide foster care to Philadelphia children unless CSS does and says things it believes it should not.”).

A second reason CSS contests the city’s seeking to bind it to the city’s anti-discrimination law seems to relate to the history of foster care in Philadelphia. CSS worked as a foster agency long before the city adopted the mandate of administering all foster care work. See Brief for Petitioners at *3–6, *Fulton*, No. 19–123. So CSS seems to see itself not as an agent of the city but instead as continuing on in the private work it has long been doing, while helping the city fulfill the city’s mandate. See *id.*; Transcript of Oral Argument at 24, *Fulton*, No. 19–123. But the relevance of its history is subject to question on two grounds. First, as Justice Kagan intimated at oral argument, it is not as if CSS would abandon its insistence that it had a Free Exercise right to discriminate against same-sex couples if CSS had only begun to serve foster children *after* Philadelphia took charge of foster care. See Transcript of Oral Argument at 23–24 (showing Justice Kagan questioning lawyer for CSS on this point). Second, CSS seems to operate with a misconception about what its history should entail. With the expansion of state power over the twentieth century, government has extended itself into lots of realms previously the province of private entities. But that does not mean that the government must allow these private entities to operate according to their own rules. Cf. *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 885 (1990) (entitling religious objectors to exemptions from generally applicable rules would make every person “a law unto himself,” impairing the ability of government to carry out its functions) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)). To the contrary, once the government legitimately claims a domain as its own, it is empowered to supplant the private agencies’ rules with its own, so long as it subjects all of them to the same rules. So while CSS may have a venerable history of foster care—it almost surely warrants great praise for undertaking this important work before the state recognized its responsibility to do so—it cannot leverage that history to act in ways that the government has good reason to prohibit.

¹⁴² See Brief for City Respondents at 19, (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) for the proposition that “persons who ‘voluntarily enroll’ in a government program ‘may not on ground of conscience refuse [its] conditions’”).

¹⁴³ See, e.g., Kindall, *supra* note 46; William M. Pinzler, ‘*Fulton v. Philadelphia*’: A Conflict Between Anti-Discrimination Laws and the Free Exercise Clause, LAW.COM (Nov. 03, 2020, 01:00 PM), <https://www.law.com/newyorklawjournal/2020/11/03/fulton-v-philadelphia-a-conflict-between-anti-discrimination-laws-and-the-free-exercise-clause/?slreturn=20201108080354> (“CSS is free to express itself outside the foster care program, and thus it is arguably not an unconstitutional condition.”).

¹⁴⁴ See, e.g., *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2019).

¹⁴⁵ For commentary arguing that the challenged laws violate the First Amendment, see, for example, Timothy Cuffman, Note, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State*

to be a tension between the two positions: Philadelphia may refuse to contract with entities, like CSS, that discriminate, but Texas, Arizona, and others may *not* refuse to contract with entities that support the BDS movement.

One might think that the two cases are distinguishable because there is nothing discriminatory about the BDS movement (notwithstanding the fact that some states have sought to defend their anti-BDS laws as efforts to combat anti-Semitism).¹⁴⁶ I am inclined to agree that the BDS movement targets Israeli policies and not the Jewish people, so it is not anti-Semitic. Still, it seems doubtful that all of those who challenge the anti-BDS laws would abandon their challenges if it turned out that the BDS movement was avowedly anti-Semitic. The ACLU, for example, which has led the challenge against many of these state laws,¹⁴⁷ sees the laws as impinging on free speech, and we know that the ACLU's robust protection for free speech does not depend on the content of the speech at issue.¹⁴⁸

If it is safe to assume that opposition to the anti-BDS laws would persist even if these laws aimed at combatting anti-Semitic speech, then in both the anti-BDS cases and *Fulton*, we would face a government decision not to contract with entities that discriminate. And if it were permissible for the government to act on this decision as regards CSS, why would it not also be permissible for the government to act on this decision as regards the entities challenging the anti-BDS laws? The answer, I believe, turns on the fact that CSS would discriminate *in the course of the activities it would carry out on the government's behalf*, whereas the anti-BDS laws deny contracts to entities no matter how close or remote the entities' support for BDS is to their government work. That is, CSS seeks to fulfill the government's functions in a discriminatory manner. The entities denied contracts under the anti-BDS laws need only have "engaged in . . . a boycott of goods or services

Anti-BDS Laws, 57 COLUM. J. TRANSNAT'L L. 115, 134–62 (2018); *Recent Cases—Recent Legislation*, 129 HARV. L. REV. 2029 (2016) (discussing S.C. CODE ANN. § 11-35-5300 (2015)); Nathaniel Sobel, *Breaking Down the Combating BDS Act of 2019 and First Amendment Challenges to State Anti-BDS Laws*, LAWFARE (Mar. 19, 2019, 7:14 AM), <https://www.lawfareblog.com/breaking-down-combating-bds-act-2019-and-first-amendment-challenges-state-anti-bds-laws> ("[A] group of leading First Amendment scholars [] argue that boycotting Israel qualifies as protected speech. 'This is an easy First Amendment case,' they told the court."); Noah Feldman, *Is the Anti-BDS Bill Constitutional? Yes, But ...*, BLOOMBERG (Feb. 6, 2019, 2:46 PM), <https://www.bloomberg.com/opinion/articles/2019-02-06/anti-bds-bill-approved-by-senate-avoids-first-amendment-questions> (There is . . . a powerful constitutional argument to be made that the state [anti-BDS] laws violate free speech.").

¹⁴⁶ See, e.g., Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1365–66 (cataloging states that have marshaled this defense).

¹⁴⁷ See Brian Hauss, *Laws Suppressing Boycotts of Israel Don't Prevent Discrimination — They Violate Civil Liberties*, ACLU (Feb. 22, 2019, 5:30 PM), <https://www.aclu.org/blog/free-speech/laws-suppressing-boycotts-israel-dont-prevent-discrimination-they-violate-civil>.

¹⁴⁸ See *Freedom of Expression - ACLU Position Paper*, ACLU, <https://www.aclu.org/other/freedom-expression-aclu-position-paper> (last visited Jan. 8, 2020).

from Israel”;¹⁴⁹ the laws do not require that the boycott relate to the services the boycotter would perform for the state.¹⁵⁰

To be sure, Philadelphia would violate CSS’s constitutional rights if it prohibited CSS from speaking against same-sex marriage as a condition of CSS’s contract with the city. So too would Philadelphia violate CSS’s right if the contract instead required CSS to forswear activities promoting traditional families in domains other than those that the contract governs (e.g., if it required CSS to dispense condoms at its after-school programs even though the after-school programs were run independent of the city). But the contract does nothing like either of these things. Instead, it simply requires that CSS abide by the same anti-discrimination principles that bind the city, and only where and for the activities CSS undertakes on Philadelphia’s behalf.

The important feature, then, is not which set of beliefs is at issue. It is whether that set of beliefs will entail a refusal of service *in the course of the service agency’s work on the government’s behalf*. States might well be within their rights to insist that their contractors not boycott one or more countries *while* carrying out the states’ functions. Philadelphia is surely within its rights to insist that CSS not boycott LGBTQ+ individuals while carrying out Philadelphia’s foster care work. More generally, where a private entity steps into the government’s shoes, its license to discriminate may be no broader than the government’s.

C. *Hate Has No Home Here*

If, as the last two Sections have sought to show, carte blanche discrimination is a non-starter, does that leave no room for conscience in commerce at all? This Section takes up the suggestion in Parts I and II that we need not adopt a categorical Equal Access policy in order to secure the ends of anti-discrimination laws, or egalitarianism more broadly construed. It champions the business owner’s right to deny service where the denial is not predicated on the would-be customer’s protected characteristics. In particular, this Section aims to protect storeowners from having to do business with those who promote hate or oppression, even when that hate or

¹⁴⁹ ARIZ. REV. STAT. ANN. § 35-393.01(1)(a) (West, Westlaw current through Second Reg. Sess. of the Fifty-Fourth Leg.). Similar language can be found in other state statutes. *See, e.g.*, NEV. REV. STAT. ANN. § 332.065(5)(A) (2019); TEX. GOV’T CODE ANN. § 2270.001 *et seq.* (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.)

¹⁵⁰ Thus, for example, in one of the challenges, a speech pathologist was unable to renew her contract with a public school district because she refused to sign a certification declaring that she would not boycott Israel while the contract was in effect. She described her BDS participation in this way: She chose to “buy[] Palestinian olive oil and refus[ed] to buy the Sabra brand of hummus because of the company’s connections to Israel.” *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 731–32 (W.D. Tex. 2019). Clearly, these buying decisions have nothing to do with her speech pathology work.

oppression is mandated by religion. In this way, the proposal aims to vindicate both conscience and equality.

Recall the hypothetical around underage marriage.¹⁵¹ To flesh it out further, imagine one Mrs. Lovett, of Mrs. Lovett's Pies and Cakes, who is approached by an elderly man and young woman and asked to bake a cake for their upcoming nuptials. In conversation, it comes out that the man, Judge Turpin, is an upstanding member of the community while Joanna, his bride-to-be, is fifteen.¹⁵² When Judge Turpin leaves the room, Joanna confesses that she has no romantic feelings for Turpin, but she is consigned to go ahead with the marriage as her parents support it, she believes that they know best, and, at any rate, their religion encourages girls to get married before age sixteen to men who have already established themselves.¹⁵³

Mrs. Lovett, appalled at the thought of underage marriage, tells the couple that the law will permit no such thing and she cannot possibly furnish a cake for an illegal marriage. But Mrs. Lovett is wrong, as Judge Turpin informs her: in all but three states, underage children can be married off—typically, so long as the couple can obtain the approval of a judge or the

¹⁵¹ See *supra* note 13 and accompanying text.

¹⁵² Those familiar with Thomas Peckett Prest's Penny Dreadful novel, *The String of Pearls* (1846), or its contemporary adaptation as *Sweeney Todd, The Demon Barber of Fleet Street* by Christopher Godfrey Bond (1970) (play) and then Stephen Sondheim and Hugh Wheeler (under the pen name Patrick Quentin) (1979) (musical), will recognize the characters' names and the rough modification of the storyline for purposes of the hypothetical. Perhaps most significantly, while Turpin is Joanna's adopted father in the story, I omit that detail here so as not to prejudice the case against underage marriage. Readers may further assume that no human beings are harmed in the making of any of the pies or cakes of the Mrs. Lovett who appears here.

¹⁵³ See, e.g., Lucy Anna Gray, *Lifting the Veil: Why Children Are Still Getting Married in America*, INDEPENDENT (Apr. 16, 2020, 8:45 AM), <https://www.independent.co.uk/news/world/americas/child-marriage-us-states-america-minimum-age-bride-girls-a9467121.html> (reporting that close to 14,000 children marry in the U.S. each year, some as young as twelve years old; 87% of them are girls and 86% of those girls marry adults—with as many as sixty years separating husband and wife); Carol Kuruvilla, *In Some Evangelical Circles, Grown Men Pursuing Teens Isn't All That Unusual*, HUFFINGTON POST (Nov. 14, 2017, 1:13 PM), https://www.huffingtonpost.com/entry/roy-moore-evangelicalism_us_5a05f4f8e4b0e37d2f37573d (“[Y]oung marriage is encouraged in some Christian communities because marrying young reduces the chance of people having sex outside of marriage, and increases the possibility of having more children. (These communities don't have a monopoly on encouraging young marriage for religious reasons, of course; the same thing can be found in certain Jewish and Muslim traditions.)”). But cf. Julie Zauzmer, *Roy Moore Allegations Prompt Reflections on Fundamentalism Culture in Which Some Christian Men Date Teens*, WASH. POST (Nov. 13, 2017, 1:57 PM), (“Randy Brinson, an influential evangelical pastor who ran against Moore in his primary race in this election, said that the evangelical Christians he knows in Alabama would generally not approve of . . . a relationship [between a thirty-one-year-old man and a fourteen-year-old girl].”). For the general state of underage marriage and the laws surrounding it, see TAHIRIH JUST. CTR., *FALLING THROUGH THE CRACKS: HOW LAWS ALLOW CHILD MARRIAGE TO HAPPEN IN TODAY'S AMERICA 2* (2017), <http://www.tahirih.org/wp-content/uploads/2017/08/TahirihChildMarriageReport.pdf> (listing only three states—Virginia, Texas, and New York—that limit marriage to adults); Anjali Tsui, *In Fight Over Child Marriage Laws, States Resist Calls for a Total Ban*, FRONTLINE (July 6, 2017), <https://www.pbs.org/wgbh/frontline/article/in-fight-over-child-marriage-laws-states-resist-calls-for-a-total-ban/> (“No state has gone as far as to bar marriage for all minors, but three have come close: Texas, Virginia and New York.”). But see Zauzmer, *supra* (“Every state allows youths under 18 to marry in certain circumstances, such as with parental consent or judicial approval.”).

underage party's parents.¹⁵⁴ Colorado, Mrs. Lovett's place of business, is one such state.¹⁵⁵ Further, in Colorado, emancipation from one's parents is automatic once an underage person marries.¹⁵⁶ And statutory rape laws do not prohibit sex between married individuals.¹⁵⁷ As such, Judge Turpin and Joanna's marriage fits within the legal parameters. In addition, because their religion dictates unions of this kind, the state would be especially loath to intervene.¹⁵⁸ Mrs. Lovett nonetheless refuses to supply the cake, citing her conscientious objection to underage marriage. Mrs. Lovett's bakery is a public accommodation and, like Mr. Phillips (the baker in *Masterpiece Cakeshop v. Colorado*) she is subject to Colorado's public accommodations law, which prohibits discrimination on the basis of religion.¹⁵⁹ Must Mrs. Lovett, like Mr. Phillips, set conscience aside and provide the cake?

Notice the parallels between Mrs. Lovett's and Mr. Phillips's opposition to providing service. Both respond to the nature of the marriage that is to be celebrated: Mrs. Lovett opposes underage marriage and Mr. Phillips opposes same-sex marriage. Mrs. Lovett might well have contended that she would bake just about any celebration cake for members of Judge Turpin's religious community; she is just unwilling to contribute to an underage marriage. In a similar vein, Mr. Phillips, along with other vendors who oppose gay marriage,¹⁶⁰ argues that his refusal is not directed at gay or lesbian individuals; he would bake cakes for a gay person's birthday, just not for a same-sex marriage.¹⁶¹

Of course, Mrs. Lovett could say that her objection is to any form of child marriage, not religious child marriage per se. She would refuse to

¹⁵⁴ Zauzmer, *supra* note 153.

¹⁵⁵ COLO. REV. STAT. ANN. § 14-2-108 (West, Westlaw through 2020 Reg. Sess.).

¹⁵⁶ A minor under the age of 16 may enter into a marriage so long as she has the consent of a legally responsible parent and the approval of a judge, *id.* § 14-2-108(1), but only if the court makes a finding that "the underage party is capable of assuming the responsibilities of marriage and the marriage would serve the underage party's best interests." *Id.* § 14-2-108(2)(a). See also *Colorado Legal Ages Law*, FINDLAW (Mar. 9, 2018), <http://statelaws.findlaw.com/colorado-law/colorado-legal-ages-laws.html> ("Colorado doesn't have an emancipation . . . statute. Emancipation generally occurs when a child reaches the age of majority (21), but can occur earlier due to marriage . . .").

¹⁵⁷ In general, "sex between a married couple in which at least one party is under the age of consent cannot be prosecuted under the law." CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 9 (2004). See generally *Age of Consent & Sexual Abuse Laws Around the World*, AGEOFCONSENT.NET, <https://www.ageofconsent.net/> (last visited Jan. 11, 2019) (insert explanatory parenthetical). In Colorado, marriage is a defense to a statutory rape charge. COLO. REV. STAT. ANN. § 18-3-402(1)(d) (West, Westlaw through 2020 Reg. Sess.).

¹⁵⁸ See, e.g., Lupu & Tuttle, *supra* note 39, at 285 ("[I]f the relevant religious community has norms with respect to who may marry within its traditions—and virtually all traditions have such norms—the state is disabled from substituting its judgment for that of the faith community on the content of those religious norms.").

¹⁵⁹ COLO. REV. STAT. ANN. § 24-34-601 (West, Westlaw through 2020 Reg. Sess.).

¹⁶⁰ See, e.g., Barronelle Stutzman, *Why a Friend Is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 9, 2015, 4:23 PM), <https://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story/>.

¹⁶¹ Alex Swoyer, *Supreme Court Case on Same-Sex Wedding Cakes: Artistic Expression vs. Civil Rights*, WASH. TIMES (Nov. 28, 2017), <https://m.washingtontimes.com/news/2017/nov/28/jack-phillips-argument-same-sex-wedding-cakes-set-/>.

supply a cake to a secular couple where there was a significant difference in age between the two marrying parties, one of them was underage, and the underage party did not consent. In that way, one might think Mrs. Lovett could avoid a charge of religious discrimination. But the claim would be of no avail: just as prohibitions on sexual orientation discrimination entail prohibitions on discrimination aimed at same-sex marriage, so too prohibitions on religious discrimination would entail prohibitions on discrimination aimed at religiously mandated (or promoted) marriage. One cannot plausibly sustain a distinction between refusing someone *because* of their religion and refusing to cater to a *central aspect* of their religion. Were it otherwise, we would have to take at face value a baker's claim that he could not be charged with anti-Semitism for refusing to provide a cake for a Bar or Bat Mitzvah since he would happily sell Jewish customers any of the birthday cakes he keeps in stock.¹⁶²

How ought the law respond to the claims of these bakers? On its face, it looks to be difficult to distinguish the two. Nonetheless this Section aims to argue that Mrs. Lovett may turn away Judge Turpin and his underage bride even while Mr. Phillips may not refuse to provide cakes for gay weddings.

To begin, consider again the two cakes with anti-gay messages that Azucar bakery refused to provide to William Jack. Recall that the Colorado Civil Rights Commission held that Marjorie Silva, the owner of Azucar, did not violate Colorado's public accommodations law in refusing because Silva would not have supplied anti-gay cakes to anyone.¹⁶³ At the same time, the Commission also held that Phillips, the baker in *Masterpiece*, did discriminate impermissibly in refusing a wedding cake to the gay couple, since the baker regularly sold wedding cakes to opposite-sex couples.¹⁶⁴ In other words, and in keeping with Equal Access, Silva merely chose the products she would sell, while Phillips nefariously chose the people he would serve.

I believe the Commission reached the right result, albeit for the wrong reason. A better strategy would pick up on a different asymmetry between the requests made of Silva and Phillips. Jack, the fundamentalist Christian customer whom Silva turned away, sought a cake with a message communicating animus toward gay and lesbian people. In contrast, the cake Craig and Mullins sought from Phillips did not convey a message whose aim was to denigrate religion. Craig and Mullins wanted a cake celebrating their marriage. As such, their commission was not a true counterpart to William Jack's. The true counterpart to the cake Silva was asked to bake would instead

¹⁶² See *supra* note 130 and accompanying text (noting that discrimination against same-sex marriage is discrimination against sexual orientation). See also *infra* text accompanying note 178.

¹⁶³ Corvino, *supra* note 113.

¹⁶⁴ *Id.*

have been a cake with one or more religious figures X-ed out or a cake with a message from a venerated source decrying religion or religious individuals.¹⁶⁵

Recognizing the distinction between these commissions points the way to a more general policy: commercial enterprises may, in the spirit of “hate has no home here,” refuse commissions communicating hate. Indeed, Marjorie Silva, the baker who refused to supply the cakes with anti-gay biblical language, described her reasoning in just this way: “If [a customer] wants to hate people, he can hate them not here in my bakery.”¹⁶⁶ Or to put the policy in more general terms: *businesses may refuse to supply goods or services that would be used in projects promoting animus toward individuals or groups on the basis of their protected characteristics*.¹⁶⁷

Because animus is the only justifiable predicate for a refusal of service that would otherwise target a protected class, the policy offers ready protection for same-sex couples who would seek goods or services for their weddings.¹⁶⁸ A marrying same-sex couple expresses each member’s love for the other. As such, the policy would not countenance a refusal to serve a same-sex couple, however conscientious that refusal was.

But what about serving individuals who do seek to promote hate? Consider a case where someone who is not a member of a protected class seeks a good or service for a project promoting hate—for example, a Neo-Nazi approaches an African American baker to order a cake denigrating African Americans for an upcoming Neo-Nazi convention. Now consider the distribution of entitlements. The state cannot, consistent with the First Amendment, prohibit Neo-Nazis from undertaking their activities, however hostile to minority races and religions those activities may be.¹⁶⁹ At the same time, in virtually no jurisdiction would Neo-Nazis be taken to be members of a protected class.¹⁷⁰ On a narrow reading of public accommodations

¹⁶⁵ For this reason, Phillips’s lawyer before the Supreme Court was just mistaken when she contended that the Free Speech Clause “protects the lesbian graphic designer who doesn’t want to design for the Westboro Baptist Church, as much as it protects Mr. Phillips.” *Gay Wedding Cake Meets Faith at U.S. Supreme Court*, RICHMOND FREE PRESS (Dec. 8, 2017, 6:56 AM), <http://m.richmondfreepress.com/news/2017/dec/08/gay-wedding-cake-meets-faith-us-supreme-court/>. The Westboro Baptist Church promotes hate; marrying gay couples do not.

¹⁶⁶ Todd Starnes, *Colorado Double Standard: Bakers Should Not Be Forced to Make Anti-Gay Cakes*, FOX NEWS (Apr. 7, 2015), <https://www.foxnews.com/opinion/colorado-double-standard-bakers-should-not-be-forced-to-make-anti-gay-cakes>.

¹⁶⁷ Ought the principle apply to animus not based on protected characteristics? I am inclined to say yes. A baker might reasonably refuse to bake a cake for a party of the “we-hate-fat-people club,” or even for a party dissing her favorite sports team. Within the confines of this Article, however, I restrict the defense of the “hate has no home here” policy to hate directed toward members of protected classes because of their protected characteristics. I seek to leverage the converging aims of refusals of service for these projects and anti-discrimination laws. I leave a defense of a broader hate-based exemption policy for another day.

¹⁶⁸ See *supra* note 12 for examples of pending or decided wedding vendor cases.

¹⁶⁹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (vindicating the right of the KKK to hold events promoting hate so long as those events did not prompt “imminent lawless action”).

¹⁷⁰ Seattle’s public accommodations law is unusual insofar as it includes “political ideology” among the impermissible grounds of discrimination in places of public accommodation. *Civil Rights*

statutes, where they protect only members with the enumerated characteristics, the baker could freely turn the Neo-Nazi away on any grounds.¹⁷¹

On the other hand, a more expansive reading of public accommodations laws would require service for “[a]ll persons,”¹⁷² with protected classes enumerated to identify not an exclusive list of people against whom businesses may not discriminate—again, anti-discrimination norms apply to everyone on this reading—but instead to underscore that it is especially wrong to discriminate against members of historically disadvantaged groups.¹⁷³ On this reading, the public accommodations law protects the Neo-Nazi, all else equal. The important point to note is that, when a putative customer desires a product or service for the purposes of promoting hate, all is not equal.

We saw in Part I that it is not unreasonable for a vendor to see herself as implicated morally in the projects to which a customer will put the good or service the vendor provides. The fact that she would feel complicit is not a sufficient reason to exempt her from a requirement to serve. But the law has special reason to attend to conscientious objections to serving customers who are engaged in hate promotion, especially where the targets of that hate include the very individuals whom anti-discrimination laws seek to protect. After all, there is something awkward, if not also counterproductive and even perverse, in having an anti-discrimination law compel someone, like our African American baker, to help further the Neo-Nazis’ project of directing animus toward his own people. By contrast, when the African American baker excludes the Neo-Nazi, he is acting in a way that is continuous with the aims of the law that the civil rights commission is empowered to enforce. If refusals of service are permissible anywhere, they should be permissible here.

To get a better handle on the scope of permissible refusals, consider, first, that the result would be the same whether or not the cake the Neo-Nazi requested contained a message. The baker could reasonably see himself as promoting hate were the Neo-Nazi to have asked him for nothing but

Enforcement, SEATTLE.GOV, <https://www.seattle.gov/civilrights/civil-rights> (last visited Aug. 11, 2020). To the extent that Neo-Nazism constitutes a political ideology, our baker might be out of luck in Seattle. Elsewhere, he is free to turn the Neo-Nazi away. For an exhaustive list of public accommodations statutes extending beyond the traditional suspect classes, see Sepper, *supra* note 39, at 639 n.25.

¹⁷¹ Gingerich, *supra* note 137, at 457.

¹⁷² Civil Rights Act of 1974, tit. II, 42 U.S.C. § 2000a(a).

¹⁷³ I am grateful to Seana Shiffrin for pointing me to this distinction. Joseph Singer urges something similar in *No Right*, *supra* note 6, at 1412–16. The view can be traced back to William Blackstone: “[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way” 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 166 (William Draper Lewis ed., 1902); *see also* Bell v. Maryland, 378 U.S. 226, 296 (1964) (Goldberg, J., concurring) (“Underlying the congressional discussions, and at the heart of the Fourteenth Amendment’s guarantee of equal protection, was the assumption that the State by statute or by ‘the good old common law’ was obligated to guarantee all citizens access to places of public accommodation.”); Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 615 (1879) (discussing “the general obligation of those exercising a public or ‘common’ business to practi[c]e their art on demand”).

unadorned, generic baked goods for the Neo-Nazi convention.¹⁷⁴ Second, any baker, of any skin color, race, ethnicity, and so on, could exercise the right in question. Everyone has the right to refuse to promote hate.

Insofar as the Neo-Nazi case does not involve a customer who is a member of a protected class, that case is a relatively easy one. But suppose now that our Neo-Nazi is replaced by an adherent of Christian Identity, a KKK group that subscribes to “a unique anti[-S]emitic and racist theology.”¹⁷⁵ For this KKK member, hate is mandated by his religion.¹⁷⁶ And suppose further that this KKK member approaches the same African American baker, this time requesting a generic cake for a Christian Identity KKK event. This looks to pose a problem for the baker’s ability to oppose the commission. Would turning the KKK member away constitute impermissible discrimination on the basis of religion?

One thought would be to have the baker insist that he is not denying service because of the KKK member’s religion, but instead because of the event at which the KKK member would serve the cake—again, a KKK convention. But we have already seen that a similar strategy is unavailing for the wedding vendor who would deny service to a same-sex couple¹⁷⁷—there is no distinguishing status from conduct where the status mandates the conduct or the conduct embodies the status.¹⁷⁸

Here is a different way of arguing that the Christian KKK case is not relevantly different from the secular Neo-Nazi case. Both parties are engaged in the same conduct—the promotion of white supremacy. If the state were to treat the two cases differently, because of the KKK’s connection to religion, one could charge the state with an Establishment Clause violation.¹⁷⁹ Or one might see in the state’s more favorable treatment of the Christian KKK member a violation of a principle of “equal regard,”¹⁸⁰ which holds that “no members of our political community ought to be devalued on account of the spiritual [or non-spiritual] foundations of their important commitments and projects.”¹⁸¹ On either way of understanding what the state may permissibly do, the result in the Christian KKK case may not be different from the result reached in the Neo-Nazi case. So, if the

¹⁷⁴ Cf. Stolzenberg, *supra* note 66, at 748.

¹⁷⁵ *Christian Identity*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity> (last visited Aug. 11, 2020).

¹⁷⁶ See, e.g., *supra* note 17.

¹⁷⁷ See *supra* text accompanying note 162.

¹⁷⁸ See *supra* notes 130 and 162.

¹⁷⁹ See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356–61 (2014); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing Off the Wall*, SLATE (Nov. 26, 2013, 2:32 PM), <https://slate.com/news-and-politics/2013/11/obamacare-birth-control-mandate-lawsuit-how-a-radical-argument-went-mainstream.html>.

¹⁸⁰ Eisgruber & Sager, *supra* note 124, at 1282–1288.

¹⁸¹ CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4 (2007).

vendor may refuse to provide the cake for the Neo-Nazi convention, then the same logic permits him to refuse to provide the cake for the Christian KKK convention.

The foregoing offers a principle that, unlike Equal Access, does not begin and end with whether the vendor offers a particular kind of good to one customer but not another. Instead, the relevant inquiry is whether the vendor can credibly claim that he does not wish to support a particular project. That is, conscientious businesses may attend to the uses to which their goods and services will be put. And on the thought that “hate has no home here,” in conjunction with the ethos of anti-discrimination laws, the state may permit conscientious vendors to refuse to supply their goods or services for projects involving hate.

I want to take the additional step of enlarging the understanding of hate that can serve as a predicate for refusing service. The relevant notion of hate should encompass not just events whose explicit aim is an assertion or celebration of the supremacy of one identity-based group relative to another, but also those that have the effect of creating or perpetuating supremacy. Therein lie the seeds of Mrs. Lovett’s right to turn away Judge Turpin and his underage bride.

Underage marriage is a tool for the oppression of women. In the vast majority of these unions, the husband is an adult and the wife is a minor. She is frequently below the age of consent, so her consent is not sought; instead, as we have seen, a parent or judge will substitute their consent for hers.¹⁸² Even where a state does recognize her consent, we might worry that that consent is not meaningful because of her youth. In many of these unions, the wife is young enough that, were her husband to have had sex with her before they were married, he could have been charged with statutory rape.¹⁸³ So the unconsented-to marriage transforms sexual assault into a non-offense. Further, in many states, the wife—while deemed old enough to marry—is not yet old enough to retain a lawyer or represent herself in court in order to seek a divorce.¹⁸⁴ It is not difficult to see how these arrangements would satisfy at least some definitions of domination.¹⁸⁵

One might contend that in many of these cases, the couple’s religion commands or at least encourages the marriage. In such cases, neither the

¹⁸² See *supra* notes 154–57 and accompanying text.

¹⁸³ See, e.g., Nicholas Kristof, Opinion, *11 Years Old, a Mom, and Pushed to Marry Her Rapist in Florida*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/sunday/it-was-forced-on-me-child-marriage-in-the-us.html>.

¹⁸⁴ See, e.g., Charlotte Alter, *Why It’s Still Legal for Underage Girls to Marry in the U.S.*, TIME (June 1, 2017, 5:39 AM), <https://time.com/4800808/why-its-still-legal-for-underage-girls-to-marry-in-the-u-s/>.

¹⁸⁵ See, e.g., IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 31–33 (1990). Marci Hamilton, a children’s rights advocate, has forcefully condemned fundamentalist religious communities in which the boys are “groomed to be rapists” while the young girls are “groomed to be victims,” and where men engage in polygamous marriages with underage girls. Marci Hamilton, *Why the Texas Supreme Court’s Ruling Regarding the FLDS Mothers Is Significantly More Protective of the Children*

couple nor the community views the marriage as an assertion of male supremacy, or at least not in the invidious way that the term generally tracks. While outsiders might construe it as oppressive—perhaps even as a form of female bondage¹⁸⁶—that is not how the couple, or their community, views it.¹⁸⁷

It should not be surprising that the community views these marriages as benign. If the religion's acknowledged purpose were instead, for example, to enslave the community's female members, the state might well step in to prevent this form of religious exercise.¹⁸⁸ But it is hardly fanciful or intolerant for someone who does not share the community's beliefs to find underage marriage troubling, any more than it would be intolerant to condemn a religious group's promotion of murder even if murder were mandated by the group's authoritative religious texts.¹⁸⁹

The question then is whether the state may compel those who oppose underage marriage to foster it, whether by contributing to underage weddings or in some other way. The answer, I think, is this: as with the Christian KKK commission, the fact that the oppressive activity has a religious basis makes no difference to Mrs. Lovett's rights. Mrs. Lovett can forswear selling cakes to any couple with an underage bride—were Jerry Lee Lewis to have entered her store requesting a cake for his upcoming nuptials to his thirteen-year-old fiancée, Mrs. Lovett would have refused him too. And if Judge Turpin, now betrothed to a fifteen-year-old boy, were to request a wedding cake from Jack Phillips, Phillips would be well within his rights to refuse the commission—so long as his refusal was based on the youth of the betrothed and not the sexual orientation of the couple.

To summarize the proposed policy so far: no business may discriminate on the basis of a protected characteristic. But the law should permit an exception for businesses that choose to deny service to any individual or group that would use the business's wares for a project or event directing hate toward members of a protected class because of their protected

Involved Than the Media Have Painted It to Be, FINDLAW (June 3, 2008), <https://supreme.findlaw.com/legal-commentary/why-the-texas-supreme-courts-ruling-regarding-the-flds-mothers-is-significantly-more-protective-of-the-children-involved-than-the-media-have-painted-it-to-be.html>.

¹⁸⁶ See generally Ajwang' Warria, *Forced Child Marriages as a Form of Child Trafficking*, 79 CHILD. & YOUTH SERVS. REV. 274 (2017) (likening child marriage to "[a] life of bondage").

¹⁸⁷ For a literary example on this point, see ATWOOD, *supra* note 13 (describing the anticipation of a young girl over her upcoming nuptials to a prominent, older man, against the backdrop of a religious society whose oppression Atwood aims to condemn).

¹⁸⁸ *Cf. Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("[I]f a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?").

¹⁸⁹ *Cf. Thomas C. Berg, Religious Exemptions and Third-Party Harms*, 17 FED. SOC'Y REV. 50, 58 (2016), <https://fedsoc.org/commentary/publications/religious-exemptions-and-third-party-harms> ("No one argues today that religious freedom shields acts causing such basic harms" as "murder, rape, [and] theft.").

characteristics.¹⁹⁰ I leave open the question of whether the law should permit other refusals of service.

Further, and importantly, unlike the question of whether the vendor would take herself to be complicit, the question of what counts as “hate” is one the state has the prerogative to answer. That is, the vendor can judge a particular event as hate-promoting, and she can decide, as a matter of conscience, whether she wants to contribute to it. But if she refuses, the state should countenance her refusal on the policy proposed here only if the event for which her goods or services are sought would *assert or perpetuate the inferiority of a protected class*. That way of formulating the policy echoes the construction of anti-subordination that the Supreme Court has articulated,¹⁹¹ as well as the one used by the federal government when prosecuting hate crimes.¹⁹²

Notice that the difference between the policy articulated here and Equal Access is not merely that the former permits some refusals of service in order to avoid felt complicity in hate or oppression while the latter would not. It is, more significantly, that the policy defended here is, in fact, more consonant with anti-discrimination norms than Equal Access. Recall that Equal Access prohibits a vendor from denying one customer a product if the vendor would be willing to sell that product to a different customer.¹⁹³ However, the policy here takes sameness of the product to be irrelevant, and respect for equality to be paramount. Thus, if a vendor is willing to provide a wedding cake for a secular underage marriage, she may not refuse a

¹⁹⁰ Putting the principle in this way naturally raises the question of whether the owner of the Red Hen restaurant was within her rights to eject Sarah Huckabee Sanders, President Trump’s press secretary. See *supra* note 10 and accompanying text. The Red Hen’s owner later explained that “[s]everal Red Hen employees are gay They knew Sanders had defended Trump’s desire to bar transgender people from the military. This month, they had all watched her evade questions and defend a Trump policy that caused migrant children to be separated from their parents.” Avi Selk & Sarah Murray, *The Owner of the Red Hen Explains Why She Asked Sarah Huckabee Sanders to Leave*, WASH. POST (June 25, 2018, 5:24 PM), <https://www.washingtonpost.com/news/local/wp/2018/06/23/why-a-small-town-restaurant-owner-asked-sarah-huckabee-sanders-to-leave-and-would-do-it-again/>. In the restaurant owner’s mind, refusing service was a matter of conscientious conviction. It was not however the kind of refusal that would fall under the policy as articulated here since Sanders was not seeking the food in the service of the activities that the owner opposes. I allow that the principle might receive a broader articulation that would cover the Red Hen owner’s refusal, but I do not seek to defend that broader application here.

¹⁹¹ The language here is loosely based on the test for impermissible sex-based discrimination in *United States v. Virginia*, 518 U.S. 515, 534 (1996), which forthrightly offers “an asymmetrical anti-subordination test.” Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 402 (1999). The language also echoes the Court’s finding in *Brown v. Board of Education* that “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.” 347 U.S. 483, 494 (1954). For canonical works on anti-subordination, see Fiss, *supra* note 109, at 157–64; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058–66 (1986).

¹⁹² Katie Mettler, *Why SPLC Says White Lives Matter is a Hate Group but Black Lives Matter is Not*, WASH. POST (Aug. 31, 2016, 6:20 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/31/splc-the-much-cited-designator-of-hate-groups-explains-why-white-lives-matter-is-one/>.

¹⁹³ See *supra* notes 5, 6, and 21 (providing paradigmatic statements of the principle).

wedding cake for a religious underage marriage. By contrast, if she refuses to participate in the oppression that underage marriage perpetuates, the state should grant her an exemption from its anti-discrimination laws, since her refusal is consonant with the values underpinning those laws. The fact that the vendor routinely sells wedding cakes to couples each of whose members is of age is of no moment whatsoever.

There will of course be difficult cases. May a fabric seller refuse to sell black fabric to a Muslim woman who would use it to make a burka?¹⁹⁴ May a vegan camping store owner refuse to sell a knife to an adherent of Santeria who will use the knife in animal sacrifice rituals?¹⁹⁵ The difficulty of determining whether these cases involve hate of the right kind is akin to the difficulty of identifying what counts as hate speech.¹⁹⁶ Importantly, though, these worries concern the outer bounds of the category of “hate.” The concept of hate has a core that is much more ready to hand. I take it to be uncontroversial that any activity aimed at denigrating members of a protected class so qualifies¹⁹⁷ and I intend for the account I have advanced to apply to the core cases in the first instance. Clarifying the full scope of “hate” will have to wait another day.

D. *The Place of Hate in the State’s Work*

Borrowing from the public rhetoric, I shall call the policy just articulated Hate Has No Home Here (HHNHH). That policy allows vendors to refuse to contribute their wares to projects that would direct hate to protected groups. So far, I have discussed HHNHH as it arises for the private enterprise acting in its own right. But what of the state, or private entities acting on its behalf? Can the state or its agents deny goods or services to

¹⁹⁴ Reasonable minds can of course differ on the question of whether the burka is oppressive. For the view that it is, see, for example, Terri Murray, *Why Feminists Should Oppose the Burqa*, NEW HUMANIST (June 26, 2013), <https://newhumanist.org.uk/articles/4199/why-feminists-should-oppose-the-burqa>. For the view that it is not, see, for example, Raifa Rafiq, *Neither Oppressed Nor Trailblazing, Muslim Women Need to Be Heard*, GUARDIAN (Mar. 8, 2019, 11:40 AM), <https://www.theguardian.com/commentisfree/2019/mar/08/muslim-women-representation-media-politics>.

¹⁹⁵ Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–47 (1993) (overturning, on First Amendment grounds, a Hialeah ordinance prohibiting the ritual slaughter of animals).

¹⁹⁶ See generally Adèle Hutton Auxier, Note, *Tiptoeing Through the Junkyard: Three Approaches to the Moral Dilemma of Racist Hate Speech*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215, 221–24 (2007) (surveying different theories).

¹⁹⁷ More expansively, one could have a policy allowing refusals of service for a set list of hate-based organizations. I would be prepared to adopt the Southern Poverty Law Center’s list, but others might dispute some of its entries. See David Montgomery, *The State of Hate*, WASH. POST (Nov. 8, 2018), <https://www.washingtonpost.com/news/magazine/wp/2018/11/08/feature/is-the-southern-poverty-law-center-judging-hate-fairly/> (highlighting the difficulty in defining hate by exploring the different viewpoints between SPLC and other organizations on its list of active hate groups). Again, the aim for now is not to arrive at a definitive list but to advance the general idea that hate can serve as a permissible basis for exclusion, leaving the scope of “hate” for future articulation.

those who pursue hate-promoting endeavors? For example, could a foster agency refuse to certify the parental fitness of a Christian Identity KKK couple?¹⁹⁸

The answer seems to turn on whether whatever the state or its agent is offering is something to which the hate-promoting patron is presumptively entitled. On the one hand, we know that the state need not confer benefits on hate-based endeavors. Thus, for example, it can deny tax-exempt status to entities that engage in invidious discrimination.¹⁹⁹ But can it, or its agents, deny goods or services to which individuals or entities would otherwise be entitled simply on the ground that these individuals or entities promote hate? Two lines of precedent suggest that they may not deny these goods and services *as a categorical matter*; on the other hand, a sufficiently compelling reason in the face of an individualized assessment could justify the refusal.

In the first set of cases—relevant to the *Fulton* context—courts consider whether the state or its agents may refuse to certify as foster parents individuals who believe that homosexuality or nontraditional gender identities are sinful. In *Blais v. Hunter*, for example, a federal district court in Washington suggested that this set of beliefs—even if religiously motivated—could disqualify the individuals who hold them.²⁰⁰ But it also insisted that holding these beliefs could not function as an automatic bar; instead, the disqualification may result only from a strict First Amendment balancing test that “tips sharply in . . . favor” of the foster-parent applicant.²⁰¹

The second set of cases involves the rights of prison inmates to practice white supremacist religions. For a recent example, consider *Fox v. Washington*, a suit brought by two inmates of a Michigan prison who are Christian Identity adherents and who challenge the Michigan Department of Prison’s refusal to provide them with a dedicated space for their own worship services.²⁰² The Department had refused because it had concluded that the prisoners’ religious freedom interests could be satisfied were the prisoners to attend the religious services of other groups that the prison already hosted,²⁰³ and it worried that providing a dedicated space for Christian Identity worship would pose a security risk at the prison.²⁰⁴ While a district court decision upheld the Department’s refusal, the Sixth Circuit vacated and remanded because it held that the refusal “substantially

¹⁹⁸ Cf. *Fulton v. City of Philadelphia*, No. 19–123; *supra* Section II.B.

¹⁹⁹ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding a denial of the university’s tax-exempt status because the University prohibits miscegenation, tax exemption should be enjoyed only by those entities that serve a public purpose, and an entity that discriminates acts contrary to public policy and so cannot be serving a public purpose).

²⁰⁰ See, e.g., *Blais v. Hunter*, No. 2:20-cv-00187-SMJ, 2020 WL 5960687, at *12 (E.D. Wa. Oct. 18, 2020) (“[T]he Court does not enjoin the Department from taking LGBTQ+ considerations into account when reviewing foster care license applications.”).

²⁰¹ *Id.*

²⁰² 949 F.3d 279 (6th Cir. 2020).

²⁰³ See *id.* at 275–76.

²⁰⁴ *Id.*

burdened” the prisoners’ religious rights.²⁰⁵ Importantly, in arriving at this holding, the Sixth Circuit not only recognized that adherents of Christian Identity believe in “racial separatism”—its adherents may not worship with non-white individuals²⁰⁶—it also relied on that belief to establish that the prison’s refusal to allow them to practice apart from non-whites constituted a substantial burden. In other words, the Sixth Circuit concluded that the refusal to host worship services that the court explicitly recognized as “racist”²⁰⁷ could constitute a violation of prisoners’ religious freedom rights.

Fox v. Washington bestows more deference on the Christian Identity adherents than is necessary, or perhaps even permissible.²⁰⁸ The Sixth Circuit might have sought to distance itself from the prisoners’ racist convictions. Government actors may do so consistent with the tenets of liberalism.²⁰⁹ Indeed, it may be that they *must* disavow racism or other invidious forms of discrimination as part and parcel of their obligation to secure robust equality for all.²¹⁰

It is also worth noting that even while *Blais* and *Fox* demonstrate great legal deference toward religious convictions that promote hate, that deference need not be absolute. In both cases, the government could have denied the accommodation so long as it could have proffered a compelling reason not to accede, and demonstrated that refusing to accede was the least restrictive way to serve that reason.²¹¹

More generally, the distinction between public agencies and private commercial entities goes to where the presumption lies, but not ultimately to whether each may in some cases refuse service – both may do so. It is just that the state or its agents may not adopt categorical rules about whom they will or will not serve. Instead, the state or its agents must conduct a searching inquiry into whether the party seeking service would in fact promote hate in a way that unavoidably interferes with the state’s compelling interest. By

²⁰⁵ *Id.* at 282.

²⁰⁶ *Id.* at 280.

²⁰⁷ The Sixth Circuit described Christian Identity as “explicitly racist.” *Id.* at 273. The Southern Poverty Law Center has also identified Christian Identity as a racist organization. *See supra* note 197.

²⁰⁸ *Cf.* Linda Greenhouse, Opinion, *The Supreme Court Nears the Moment of Truth on Religion*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/opinion/supreme-court-religion.html> (arguing that the Sixth Circuit was compelled by prior mistaken religious freedom cases to rule as it did).

²⁰⁹ The Court did just this in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), when it recognized that anti-discrimination laws were “well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination. . . .” *Id.* at 571–72.

²¹⁰ *See, e.g.,* Corey Brettschneider, *How Should Liberal Democracies Respond to Faith Based Groups That Advocate Discrimination? State Funding and Nonprofit Status*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 72, 74–75 (Austin Sarat, ed., 2012) (describing “democratic persuasion,” or the state’s responsibility to counter freedom of expression with efforts to explain why discriminatory viewpoints “are inconsistent with a respect for free and equal citizenship”). *Cf.* *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education. . . .”).

²¹¹ Both cases undertake a strict scrutiny analysis. *See Blais v. Hunter*, No. 2:20-cv-00187-SMJ, 2020 WL 5960687, at *10–11 (E.D. Wa. Oct. 18, 2020) ; *Fox*, 949 F.3d at 282–283.

contrast, private businesses may refuse service to anyone involved in a hate-based project.

While the HHNHH policy I have advanced cannot, then, operate as readily in the domain of public services as in private commerce, the government could in some cases refuse to lend its—or the public’s—resources to the promotion of hate. And indeed, if the government adopted the robust egalitarianism described above, it would see that there is often—perhaps even always—a compelling reason to refuse to promote hate.²¹²

IV. VENDOR REFUSALS AND STATE ACTION

We have just seen that there are limits on the state’s, or its agents’, refusal to provide service to individuals or entities where they seek the service in question for a project promoting hate. In particular, neither the state nor its agents may categorically refuse to provide goods or services on the basis of the would-be patron’s protected characteristics, even when those characteristics are inextricably bound up with hate-promoting projects (as with the adherent of the Christian Identity KKK). At first glance, the situation looked to be different for private commercial enterprises that do not act as agents of the state. I argued that under HHNHH, a commercial vendor could refuse to serve anyone who would use the vendor’s wares in a hate-promoting project. Still, one might wonder whether there is problematic state action if the state merely *permits* a private business to, say, turn away the Christian Identity KKK patron. Might these refusals involve the state in promoting some viewpoints and frustrating others? After all, the state would not permit a business to turn away, say, a Christian group seeking goods or services for a widely-celebrated Christian holiday (e.g., Christmas, Easter) or even a church-specific event that promoted Christianity but did not denigrate other religions or groups.

The problem, generally stated, is this: HHNHH allows messages celebrating a protected class but not those denigrating a protected class. In that way, it looks perilously similar to the policy the Supreme Court rejected in *R.A.V. v. City of St. Paul*, where it overturned a St. Paul ordinance criminalizing cross burning.²¹³ Justice Scalia, writing for the Court, decried the ordinance because, by his lights, it discriminated on the basis of viewpoint:

Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the

²¹² Cf. Sepinwall, *Conscience and Complicity*, *supra* note 57, at 1929 (arguing that courts should rarely defer to religious beliefs that would express animus toward protected groups).

²¹³ 505 U.S. 377 (1992).

placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are²¹⁴

The passage advances two different complaints about the ordinance. The first two quoted sentences rail against a policy that would condemn people on the basis of protected characteristics but not on other grounds that might be just as hurtful (e.g., inveighing against the target's mother). That is a real distinction though not an embarrassing one, once one appreciates that protected characteristics are protected precisely because of their subordinating social meaning.²¹⁵ (And at any rate, virtually everyone has a mother, putting all of the fighting firebrands on equal footing.)

The Court's second complaint is that the St. Paul ordinance would permit signs condemning "anti-Catholic bigots" but not "papists." Here too the distinction is real but defensible as a moral matter (even if not as a constitutional matter). There is a moral difference between speakers bent on bigotry (the anti-Catholics are "bigots") and those engaging in benign religious devotion (the "papists"). Justice Scalia needed to argue that the ordinance would condemn anti-Catholic bigots but not, e.g., anti-Protestant bigots to make his point that the ordinance engaged in *morally problematic* viewpoint discrimination. And, importantly, the HHNHH policy does not produce that form of discrimination as it allows businesses to turn away bigots of any stripe.²¹⁶

Yet even if HHNHH's asymmetries can be defended on moral grounds, *R.A.V.* still evokes a constitutional worry. That worry takes two forms: First, does the First Amendment allow the state to enshrine a policy that treats projects promoting hate differently from those promoting toleration (e.g., allowing businesses to turn away anti-gay commissions but not gay-activist commissions)? Second, even if the state may do so, is the state

²¹⁴ *Id.* at 391–92.

²¹⁵ See *supra* notes 136–37 and accompanying text.

²¹⁶ In dissent, Justice Stevens aims to attack Justice Scalia's on different grounds.

The response to a sign saying that "all [religious] bigots are misbegotten" is a sign saying that "all advocates of religious tolerance are misbegotten." Assuming such signs could be fighting words (which seems to me extremely unlikely), neither sign would be banned by the ordinance, for the attacks were not "based on . . . religion" but rather on one's beliefs about tolerance.

Id. at 435 (Stevens, J., concurring in the judgment) (alterations in original). Justice Stevens has unhelpfully changed the hypothetical. For one thing, he is right that neither of his signs contains fighting words and indeed both should be permitted. For another, Justice Stevens has not made the epithets specific to a particular protected group and it was the ordinance's differential treatment of protected groups that led to its infirmity. Indeed, that is the right way to see the problem with the ordinance—not as viewpoint discrimination but as an equality violation.

constitutionally empowered to determine what counts as “hate”? I address each worry in turn.

On the policy advocated here, the state may permit storeowners to turn away those with supremacist messages (i.e., “we’re-better-than-you”) but not those with equality-insisting messages (i.e., “we’re-just-as-good-as-you”). But that differential treatment is precisely what rendered the ordinance in *R.A.V.* constitutionally infirm. To motivate the worry, imagine that a Christian Identity KKK member seeks the services of a photocopy shop for purposes of producing leaflets he will distribute at a white supremacist rally. If viewpoint discrimination is an issue at all, it will be much more acute where the requested good involves printed words rather than a generic product, like an unadorned cake. If the state protects the shop owner’s right to refuse service, would this count as an undue state restriction on speech?

To be sure, the state is not prohibiting the white supremacist speech. Nor is the state mandating that printing shops refuse to publish white supremacist speech. Nor, finally, is the state preferring the printer’s message over the white supremacist’s. The printer is not disseminating any message in refusing service. No one other than the customer need know the grounds of her refusal, or even that she refused service in the first place.²¹⁷

But one might still worry that state action sustaining the rights of printing shops to refuse service because the printed material would express a particular set of viewpoints constitutes an impermissible restriction on speech. The state appears to be acting in a way that impairs dissemination of some viewpoints but not others—assuming, for example, that the printer could not refuse service to a Black advocacy or gay Pride group.²¹⁸

Does the state impermissibly favor the printer’s anti-white supremacy stance in finding that the printer has permissibly refused service? I do not think so. The state sustains the printer’s right to withhold her energies from promoting hate, but it does not do so because of the particular brand of hate the printer refuses to serve. So long as the state would have been just as willing to sustain the rights of a printer to withhold printing services from, say, a Black supremacist group, then it does not act in order to promote or impede particular viewpoints.

Still, in virtue of permitting printers to turn anyone away on ideological grounds, one might worry that the state is limiting the diversity of views made available for others’ consideration.²¹⁹ A few thoughts in response.

²¹⁷ Cf. *Spence v. Washington*, 418 U.S. 405, 409–10 (1974) (identifying among the criteria for something to count as speech that its message be readily discernable by an audience).

²¹⁸ I take it that neither of these operates with a supremacist ideology—i.e., each seeks to affirm its equal, not superior, moral worth relative to all others.

²¹⁹ Cf. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940 (2006) (“One may also argue that the government must treat all viewpoints as equal in the eyes of the law, at least where private speech . . . is involved, because the government must remain subservient to, rather than dominant over, public opinion.”); *Burton v. Wilmington Parking Auth.*, 365

First, if this is a genuine and widely felt concern, citizens of the state can advocate to have “ideology” included as one of the categories that the state’s public accommodations laws specifically protect.²²⁰ Second, even if the effect of these refusals is to reduce the variety of views citizens encounter,²²¹ one could deny that state action produced this reduction in just the same way that the Court denies that there is state action in, say, school voucher cases.²²² There, the claim is that the state does not impermissibly support religion even if it permits parents to use vouchers for religious school tuition since it is the parents themselves who have chosen the place of education for their children.²²³ By the same token, one could claim here that the state does not impermissibly restrict the number of ideological views on offer or the relative prominence of those views since it is the printers themselves who choose which views they will or will not publish.

So the state may in principle sustain vendors’ rights to refuse to contribute to hate-promoting projects and its doing so need not constitute state action. A second worry remains, however, insofar as HHNHH allows the state to determine what *counts* as hate.²²⁴ There could indeed be something troubling about having the state engage in these kinds of determinations. As the Court rightly found in *Masterpiece*, whether a vendor permissibly turns someone away “cannot be based on the government’s own assessment of offensiveness.”²²⁵ But I suspect that there is a meaningful difference between offensiveness and hate, as the latter is defined here. An offensiveness determination is unavoidably subjective—something is offensive just if it gives offense, which is to say, just if an audience finds it to be offensive.²²⁶ On the other hand, a determination that some activity asserts or perpetuates the inferior status of a protected group, which is what

U.S. 715, 722 (1961) (“[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”).

²²⁰ Seattle’s public accommodations ordinance does just this. See *supra* note 170 and accompanying text.

²²¹ The possibility that the variety of views on offer might be diminished was far more plausible in, for example, *Red Lion Broadcasting Co. v. FCC*, where the Court had to contend with the scarce resource of broadcast frequencies. 395 U.S. 367, 369–72 (1969). By contrast, the prospect of diminished access to particular viewpoints from a policy that permits printing shop owners to deny service on non-identity based grounds seems far more unlikely today, where social media can accommodate all speakers.

²²² See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002) (finding that the state program at issue was “neutral in all respects toward religion” and “a program of true private choice”).

²²³ *Id.* at 652 (“A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients.”).

²²⁴ I acknowledge this difficulty above. See *supra* text accompanying notes 194–97.

²²⁵ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018).

²²⁶ *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017) (“The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint.”).

HHNHH contemplates,²²⁷ need not be subjective. After all, hate crimes laws are formulated to target just this kind of activity.²²⁸

In sum, there would be no problematic state action where the state allowed private enterprises to deny service for projects that promoted hate because the decision to turn the patron away would rest with the enterprise alone. Nor need the state engage in problematic viewpoint discrimination in defining “hate” for HHNHH; that definition could just be the one used in hate crimes laws across the country.

CONCLUSION

On the proposal that I have been advancing, public accommodations may not refuse service to individuals because of their protected characteristics, no matter the assault on conscience that compelled service might wage. With that said, and consistent with the sympathetic construction of complicity and the conscientious model I offered in Part I, vendors need not support others’ hate-promoting projects, even if those projects are rooted in the values or activities or commitments of protected groups.

I have aimed to argue that there is in fact no conflict between equality and refusing service to those who seek a vendor’s products for hateful ends. Those ends are themselves equality-undermining, so, if anything, vendors vindicate equality when they refuse to contribute to them. I want to end by considering how we might treat vendors with conscientious objections to non-hate-based projects, and to suggest that we offer them more compassion than advocates of Equal Access might support.

Here is the general thought: public accommodation laws confer a rhetorical advantage on the customers they protect. These customers cannot be ejected from a place of business simply on the basis of their possessing a protected characteristic. Privileged to stay, they might as well engage in a civil dialogue with the owner who would otherwise turn them away. Hopefully these dialogues would produce a compromise; at the very least, they might humanize the parties on each side. To be sure, the customer always retains the power to compel service or else file a legal complaint. But the customer’s power to hold the vendor to the vendor’s legal obligations should function as a backstop. There is much more to be gained from compassionate engagement than civil rights bullying.²²⁹ And the market, far from being a sphere reduced to profit and profanity, might just be a place where conscience, compassion, and civil rights can all prosper.

²²⁷ See *supra* note 191 and accompanying text.

²²⁸ See *id.*

²²⁹ Cf. Colleen Shalby, *Winery That Refused To Hold a Wedding for Same-Sex Couple Reverses Course Following Criticism*, L.A. TIMES (Sept. 13, 2019, 3:44 PM), <https://www.latimes.com/california/story/2019-09-13/winery-told-same-sex-couple-they-couldnt-have-wedding-at-venue-reverses-course-following-criticism> (describing how a California winery that initially refused to hold a same-sex wedding at its venue reversed course, and issued an apology for causing “anyone pain,” in the face of social media pressure).

